Supreme Court

UNITED STATES REPORTS

VOLUME 394

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1968

OPINIONS OF MARCH 3 (CONCLUDED) THROUGH MAY 12, 1969
ORDERS OF MARCH 10 THROUGH MAY 12, 1969

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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ERRATA.

20 Wall. 375 (title) and p. xx, lines 12 from top and 8 from bottom: "Ferris" should be "Perris."

100 U. S. XIII, line 10: "Kirkland" should be "Kirtland."

101 U. S. x, lines 21 from top and 3 from bottom; and p. XIII, line 22 from top: "Douglas" should be "Douglass."

102 U. S. XII, line 11 from bottom; p. xv, line 19 from top; and p. 739, line 4 from top: "Tait" should be "Tate."

103 U. S. xv, line 8 from bottom; p. xx, line 6 from top; and p. 851, line 4 from bottom: "Barber" should be "Barbour."

237 U. S. 580, third line below title of case: "1914" should be "1915."

237 U. S. 726, line 18 from bottom: "Troop" should be "Toop."

365 U. S. 263, line 3 of footnote: "(1865)" should be "(1866)."

386 U. S. 969, date line under heading "ORDERS": "March 13, 1967" should be "March 13, 20, 1967," and the following should appear below the last entry on the page:

"March 20, 1967.

"Miscellaneous Orders.

"No. 1040. QUINAULT TRIBE OF INDIANS *v.* GALLAGHER, SHERIFF, ET AL. C. A. 9th Cir. The Solicitor General is invited to file a brief expressing the views of the United States."

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

EARL WARREN, Chief Justice.
HUGO L. BLACK, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
ABE FORTAS, Associate Justice.
THURGOOD MARSHALL, Associate Justice.

RETIRED.

STANLEY REED, Associate Justice.
TOM C. CLARK, Associate Justice.

JOHN N. MITCHELL, Attorney General.
ERWIN N. GRISWOLD, Solicitor General.
JOHN F. DAVIS, Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HENRY CHARLES HALLAM, Jr., Librarian.

388400

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, viz.:

For the District of Columbia Circuit, EARL WARREN, Chief Justice.

For the First Circuit, ABE FORTAS, Associate Justice.

For the Second Circuit, JOHN M. HARLAN, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, EARL WARREN, Chief Justice.

For the Fifth Circuit, HUGO L. BLACK, Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, THURGOOD MARSHALL, Associate Justice.

For the Eighth Circuit, BYRON R. WHITE, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

October 9, 1967.

(For next previous allotment, see 382 U. S., p. v.)

DEATH OF GENERAL DWIGHT D. EISENHOWER.

SUPREME COURT OF THE UNITED STATES.

MONDAY, MARCH 31, 1969.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE FORTAS, and MR. JUSTICE MARSHALL.

THE CHIEF JUSTICE said:

The Court meets this morning for the sole purpose of paying tribute to the memory of Dwight D. Eisenhower, the thirty-fourth President of the United States.

The passing of General Dwight D. Eisenhower closes an illustrious chapter of world history. His accomplishments in war and peace distinguish him as one of the great men of this century.

As Supreme Military Commander of the forces of the free world during the greatest crisis in world history, he made possible one more opportunity for honorable and lasting universal peace.

As a civilian statesman, his dedication was to that cause, and as President of the United States that became his preoccupation. He was a civilian at heart and espoused the simple virtues of American life. He was generous in spirit and action and endowed with a cheerful and understanding nature that endeared him to people everywhere without regard to politics or divisive issues.

General Eisenhower's passing will be mourned by people of good will throughout the world.

Out of respect for his memory, the Court will stand adjourned until ten o'clock tomorrow morning.

TRIBUTE TO MR. JUSTICE DOUGLAS.

SUPREME COURT OF THE UNITED STATES.

MONDAY, APRIL 21, 1969.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE FORTAS, and MR. JUSTICE MARSHALL.

THE CHIEF JUSTICE said:

We will pause a moment to record orally the passing of a notable event in the history of the Court.

Since our last session, MR. JUSTICE DOUGLAS passed an important milestone in his judicial career. On April 17th, he completed thirty years of distinguished service on this Court. Only nine others in the long history of the Court have achieved that distinction—John Marshall, Bushrod Washington, Joseph Story, William Johnson, John McLean, James M. Wayne, Stephen J. Field, John M. Harlan, and HUGO L. BLACK. Of these 10, only JUSTICE DOUGLAS and JUSTICE BLACK were appointed in this century.

When JUSTICE DOUGLAS came to the Court, Volume 306 of the United States Reports was being written. We are now working on Volume 394, which indicates his work is to be found in almost one-fourth of all the Volumes of our Reports.

He has written on almost every conceivable issue, and in this dynamic era he has contributed greatly to the jurisprudence of the Court. We wish him years of continued success and happiness in his service to the Court.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1968.

UNITED STATES *v.* LOUISIANA ET AL. (TEXAS BOUNDARY CASE).

ON CROSS-MOTIONS FOR THE ENTRY OF A SUPPLEMENTAL DECREE AS TO THE STATE OF TEXAS.

No. 9, Orig. Argued November 18, 1968.—Decided March 3, 1969.

Section 2 (b) of the Submerged Lands Act of 1953 confines the gulfward boundary of submerged lands granted by the Act to not more than three marine leagues from the "coast line," which Texas contends refers to the coastline as it existed in 1845, when Texas entered the Union. *Held:* The Convention on the Territorial Sea and the Contiguous Zone, whose definitions have been adopted by the Court for purposes of the Submerged Lands Act (*United States* v. *California,* 381 U. S. 139) defines "coast line" as the modern, ambulatory coastline resulting from erosion and accretion, and it is from that line that Texas' gulfward boundary must be measured. Pp. 2–6.

Louis F. Claiborne argued for the United States on its proposed supplemental decree as to the State of Texas. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Martz, Roger P. Marquis,* and *George S. Swarth.*

Houghton Brownlee, Jr., Assistant Attorney General of Texas, argued for the State of Texas on supplemental decree proposed by Texas. With him on the brief were

Crawford C. Martin, Attorney General, *Nola White,* First Assistant Attorney General, *A. J. Carubbi, Jr.,* Executive Assistant Attorney General, and *J. Arthur Sandlin* and *C. Daniel Jones, Jr.,* Assistant Attorneys General.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This proceeding is a sequel to last Term's *United States* v. *Louisiana,* 389 U. S. 155 (1967), in which we held that the three-league (nine-mile) belt of submerged lands beneath the Gulf of Mexico granted to Texas by the Submerged Lands Act of 1953[1] was not to be measured from the edge of artificial jetties built in the Gulf by Texas since 1845 but from Texas' coastline as it existed in 1845 when Texas was admitted to the Union. The cartographic work required to define the 1845 coastline and the gulfward boundary three leagues distant has been completed, and the United States and Texas have agreed upon their locations.[2] However, the 1845 coastline has been substantially modified by extensive erosion and some accretion in the intervening period of more than a century. This modification has occasioned a dispute between the United States and Texas as to whether the Act's express limitation in § 2 (b), that in no event shall the boundaries of the grant of submerged lands "be interpreted as extending from the coast line . . . more than three marine leagues into the Gulf of Mexico," is to be read as measuring from the 1845 coastline, as Texas contends, or from the coastline as it exists currently or at any time in the future, as the United States contends.[3] If the limitation is read as measuring from

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[1] 67 Stat. 29, 43 U. S. C. §§ 1301–1315. In *United States* v. *Louisiana,* 363 U. S. 1, 84 (1960), we held that the Act entitled Texas, as against the United States, to the submerged lands underlying the Gulf of Mexico to a distance of three marine leagues from Texas' "coast line." We expressly reserved the question of what is the "coast line" from which to measure this three-league grant. 363 U. S., at 79. See also 389 U. S., at 156–157 and n. 1.

[2] A Stipulation filed with the Court identifies Texas' 1845/1849 coastline and also its gulfward boundary three leagues distant. An Act of November 24, 1849, Laws, 3d Tex. Leg., c. 2, p. 4, adopted with the consent of Congress, Act of July 5, 1848, 9 Stat. 245, extended Texas' boundary opposite Sabine Pass. The United States has accepted Texas' three-league boundary opposite the western half of Sabine Pass, not as a boundary as it existed when the State came into the Union in 1845, but as one approved by Congress before passage of the Submerged Lands Act, and as such equally entitled to recognition under § 2 (b). The line identified in the Stipulation as the line to be recognized as Texas' historic offshore boundary includes the 1849 extension, but the United States reserves

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the effectiveness of that extension as against other claims, for example, any that might be asserted by Louisiana. See Memorandum of United States 16–18.

[3] Section 2, 43 U. S. C. §1301, so far as relevant here, is as follows:

"(a) The term 'lands beneath navigable waters' means—

. . . . .

"(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles,

. . . . .

"(b) The term 'boundaries' includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 4 hereof but in no event shall the term 'boundaries' or the term 'lands beneath navigable waters' be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

"(c) The term 'coast line' means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."

the modern, ambulatory coastline, Texas claims that it would be denied substantial submerged acreage as a result of post-1845 erosion.[4] We ordered oral argument. 393 U. S. 811 (1968). We agree with the United States that the term "coast line" means the modern, ambulatory coastline.

The term "coast line" also appears in § 4 of the Submerged Lands Act. Section 4 approves a seaward boundary three miles distant from the "coast line" of each coastal State, except that if a State can show that its boundary as it existed at the time of entry into the Union or as approved by Congress extended into the Gulf of Mexico more than three miles from the coastline, that State is entitled to claim the submerged lands within such boundary, subject however to the express limitation of § 2 (b). See §§ 2 and 4, 67 Stat. 29, 31, 43 U. S. C. §§ 1301, 1312; *United States* v. *Louisiana,* 363 U. S. 1 (1960).

The argument of the United States that "coast line" means the modern ambulatory coastline is based on our decision in *United States* v. *California,* 381 U. S. 139 (1965). The issue there was whether particular bodies of water on the California coast were "inland waters" within the meaning of § 2 (c) which provides that "[t]he term 'coast line' means the line . . . marking the seaward limit of inland waters." We held that the legislative history showed that Congress intended that the courts should define the term "inland waters." In discharging that assignment we concluded that the Convention on the Territorial Sea and the Contiguous Zone[5] provided "the best and most workable definitions available." Accordingly, we adopted those definitions for purposes of the Submerged Lands Act. 381 U. S., at 165.

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[4] It was represented on oral argument that between 17,000 and 35,000 acres would be lost to Texas as a result of such erosion.

[5] [1964] 15 U. S. T. (pt. 2) 1607, T. I. A. S. No. 5639.

The Convention defines "coast line" as the modern, ambulatory coastline; the decree entered several months later in accordance with our opinion in *California* expressly provides that "[t]he coast line is to be taken as heretofore or hereafter modified by natural or artificial means . . . ." 382 U. S. 448, 449 (1966).

We said further in *California* that "[t]his [adoption of the Convention's definitions] establishes a single coastline for . . . the administration of the Submerged Lands Act . . . ." 381 U. S., at 165. Our conclusion in this case that "coast line" means the modern, ambulatory coastline therefore necessarily follows from our decision in *California*. See *United States* v. *Louisiana, supra,* 389 U. S., at 162, n. 2 (STEWART, J., concurring in result). There is no basis for a finding that "coast line" has a different meaning for the purpose of determining the baseline for measurement of the three-league maximum limitation. Nothing on the face of the Act or in its legislative history supports a different meaning.[6] Rather it seems evident that Congress meant that the same "coast line" should be the baseline of both the three-mile grant and the three-league limitation. Texas suggests no ground for a distinction, but argues that measurement from the modern, ambulatory coastline would produce an inequitable result and work havoc with orderly mineral development. It is true that last Term's decision that the three-league belt should be measured from the 1845 coastline and not from the edge of subsequently constructed artificial jetties deprived Texas of the benefit of post-1845 accretion. It is also true that the use of the modern, ambulatory coastline as the baseline from which the limitation is measured will penalize Texas for post-1845 erosion and may present practical difficulties for mineral lessees. But any alleged inequitable results, as well as any alleged detriment to orderly mineral development, derive from a consistent reading of the scheme Congress fashioned; thus Texas must look to Congress for relief.

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[6] Our decision in *California* also forecloses any argument that the term "coast line" means the coastline as it existed at the date of passage of the Submerged Lands Act.

Since the parties have agreed that the decree proposed by the United States should be entered if its view on the disputed point is sustained, we direct the entry of the supplemental decree proposed by the United States.[7]

It is so ordered.

THE CHIEF JUSTICE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

[For supplemental decree entered in this case, see *post*, p. 836.]

MR. JUSTICE BLACK, dissenting.

I would decide this case in favor of Texas. It is another of a long-continued and apparently never-ending series of lawsuits between the United States and Texas, trying to settle the location of the boundaries of lands submerged under ocean and Gulf waters that Congress, in 1953, validly conveyed to the States in the Submerged Lands Act.[1] The dispute is a narrow one. This Court held in *United States* v. *Louisiana*, 363 U. S. 1 (1960), that the United States had in the Submerged Lands Act conveyed to Texas submerged lands out into the Gulf for a distance of three leagues, about nine miles, from the State's coastline. And we held in *United States* v. *Louisiana* (Texas boundaries), 389 U. S. 155, 161 (1967), that "the congressional grant to Texas of three marine leagues of submerged land is measured by the historical state boundaries 'as they existed' in 1845 when Texas was admitted into the Union." That case, however, did not attempt to identify with precision where the coastline was located, but that question is no longer in dispute for here the parties have stipulated the location of the seaward boundary of Texas when it was admitted into the Union. In that same case we rejected arguments that we should follow the second *California* case, *United States* v. *California,* 381 U. S. 139 (1965), in holding that a dispute over the state and national submerged boundary line should be decided by international law and treaties. In declining to apply the same treaty in the United States and Texas dispute, we said, "This is a domestic dispute which must be governed by the congressional grant," 389 U. S., at 161, and thereby rejected the idea that the question was controlled by international law or treaty. Obviously, the same principle equally applies here, in this further phase of the very same submerged land dispute. No one of the international family of nations is greatly interested and certainly none can control the way in which another nation divides itself into subordinate governmental units for control of that country's own inland waters. That is a problem for each nation to decide for itself.

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[7] Although the three-mile minimum grant measured from the modern coastline has no present application in the case of Texas, the decree includes provisions to cover the situation which would exist if accretion or artificial construction should at some future time extend the coastline more than six miles beyond the 1845–1849 position.

[1] 67 Stat. 29, 43 U. S. C. §§ 1301–1315.

Moreover, I pointed out in my dissent to the Court's holding on the counter motions in the *Louisiana Boundary Case,* decided today, reasons why the second *California* case should not be held to establish a uniform rule for deciding all controversies concerning disputed questions of submerged land boundaries arising out of the Submerged Lands Act. *Post,* p. 78. This case now before us concerning the Texas boundary again refutes any idea that applying treaties and international law to settle such local disputes between the Federal Government and a State will bring about stability, certainty, or expedition in carrying out the will of Congress. For here we are told that even if the United States wins, it will probably take a very long time to decide this controversy under the complexities of measurement necessary in accordance with the international treaty rules.[2] We are warned also that another boundary lawsuit between State and Nation is already brewing with a second just around the corner from it. Consolation is also offered because we are told that we can continue in case after case to keep our decrees open for future lawsuits. All of this goes to emphasize to me that it has been a mistake for this Court to advance the view that these land boundaries should be settled by courts. Obviously, the best way to settle a boundary dispute, whether water or land, is to designate a governmental agency that can undertake the complex problem of determining and marking where the inland and territorial waters meet. As I have pointed out in my dissent in the *Louisiana Boundary*

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[2] The United States describes the way in which the measurements will have to be taken as follows:

"This work is done by photogrammetry—that is, by aerial photographs taken when the sea is exactly at the level of mean low tide. These are then correlated with maps by use of control points, and the water line shown on the photographs is transferred to the maps. There are only limited times when the tide reaches the proper stage while there is suitable daylight for such photography and there is no offshore or onshore wind to dislocate the water line. When the necessary conditions do concur, the tide stage lasts only a few minutes. Thus, photography of an extensive coast such as that of Texas may be a protracted operation. Subsequent cartography requires skilled and painstaking work that cannot be done hurriedly or by mass production methods." Memorandum in Support of Proposed Decree, July 15, 1968, p. 28, n. 13.

Case, decided today, Congress in 1895 passed an Act specifically charging a competent government department to consider and mark such a line.[3] If the Court is willing to stay its hand and let this congressionally selected agency identify the inland water-outer sea line in future cases in accordance with this Act of Congress, we may hopefully look forward to having the courts relieved of this nonjudicial duty. I believe experience proves, however, that the effort of Congress to straighten out this muddle and give the submerged lands to the States is destined to a long, slow, almost endless delay, if the problem continues to be left to this Court.

The effect of the Court's holding today is that where the process of accretion is building up new land along the shores, the boundaries Texas may claim are not extended because, as we held last Term, they remain irrevocably fixed by the 1845 line, but as erosion gradually pushes back the present coastline at other points along the shore, the outer limit of the submerged lands owned by Texas is also pushed back toward shore. This argument of the United States, accepted today by the Court, truly deserves the ironic tribute by counsel for Texas in oral argument that it works for the United States precisely as the old game of "heads I win, tails you lose." Moreover, the Court admits that if the United States wins, the boundary between state and federal lands will be an ambulatory one, with oil leases by the State constantly subject to invalidation as erosion takes its toll on the land along the shore. The Court says that these inequitable results "derive from . . . the scheme Congress fashioned." *Ante,* at 6. I think those inequities rather result from the interpretation this Court has given the Act, chiefly by saying that Congress intended to give the task of marking submerged land to judges rather than to surveyors, and by holding further that the task should be handled by reference to international treaties. The uncertainty and confusion created for those who accept oil leases from the State, and the unfairness of the one-sided rule under which only Texas can lose by future natural changes in the shoreline, can be eliminated by simply construing "coast line" in § 2 (b) of the Act to have the same natural meaning we attributed to that phrase only last Term, namely the historic coastline "as it existed" when Texas was admitted to the Union. And secondly, in future cases, all these problems and inequities could be simply avoided by choosing to follow the Coast Guard line, marked out as authorized by Act of Congress.

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[3] 28 Stat. 672, 33 U. S. C. § 151. Congress first entrusted this duty to the Treasury Department, later to the Commerce Department, and later to the Commandant of the Coast Guard.

I dissent from the Court's acceptance of the proposed United States decree and would approve the decree of Texas.

UNITED STATES *v.* LOUISIANA ET AL. (LOUISIANA BOUNDARY CASE).

ON CROSS-MOTIONS FOR THE ENTRY OF A SUPPLEMENTAL DECREE AS TO THE STATE OF LOUISIANA.

No. 9, Orig.—Argued October 14–15, 1968.—Decided March 3, 1969.

In *United States* v. *Louisiana,* 363 U. S. 1, the Court held that by the Submerged Lands Act of 1953 the United States had quitclaimed to Louisiana lands underlying the Gulf of Mexico within three geographical miles of the coastline, the United States being declared entitled to the lands further seaward. The decree and the Act defined "coast line" as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." The United States and Louisiana filed cross-motions for a supplemental decree designating the boundary of the lands under the Gulf owned by Louisiana, the parties differing primarily with respect to that part of the coastline consisting of "the line marking the seaward limit of inland waters." The United States contends that the definitions of "inland waters" contained in the international Convention on the Territorial Sea and the Contiguous Zone (hereafter Convention) should determine the location of that line, while Louisiana urges that the governing boundary is a line it calls the "Inland Water Line" which was fixed by the Commandant of the Coast Guard pursuant to an 1895 federal statute which directed the drawing of "lines dividing the high seas from rivers, harbors, and inland waters." Louisiana urges, alternatively, that the decree proposed by the United States reflects an overly strict construction of the Convention's provisions. *Held:*

1. That part of Louisiana's coastline which, under the Submerged Lands Act, consists of "the line marking the seaward limit of inland waters," is to be drawn in accordance with the Convention's definitions. Pp. 17–35.

(a) Congress deliberately "chose to leave the definition of inland waters . . . in the Court's hands" (*United States* v. *California,* 381 U. S. 139, 157), and did not intend to tie the meaning of "inland waters" to the 1895 Act, which was enacted to separate the areas in which shipping must follow inland navigation rules from those in which it must follow international rules. Pp. 19–21.

(b) In *United States* v. *California* the Court held that the Convention's definitions were "the best and most workable . . . available," and adopted them for the purposes of the Submerged Lands Act. P. 21.

(c) Nothing in either the enactment of the 1895 Act or in its administration indicates that the United States has treated the "Inland Water Line" as a territorial boundary. The reasonable regulation of navigation is not alone a sufficient exercise of dominion to constitute a claim to historic inland waters; and in any event no such claim can be made in the face of long-standing disclaimers of historic title and the absence of any treatment of the "Inland Water Line" by the United States as delimiting an area within which it can exercise jurisdiction over anything but navigation. Pp. 21-32.

(d) The Court's adoption in *United States* v. *California* of the Convention definitions was "for the purposes of the Submerged Lands Act" and not simply for the purpose of delineating a particular State's coastline. If the inconvenience of an ambulatory coastline proves substantial, the problems may be resolved through legislation or agreement between the parties. Pp. 32-35.

2. Though the Court is able, on the basis of the materials now before it, to decide many issues involving application of the Convention to the Louisiana coast, the Court has decided to refer to a Special Master several particularized disputes over the precise boundary between submerged Gulf lands belonging to the United States and those belonging to Louisiana, since resolution of several of such disputes cannot be made without evidentiary hearings and resolution of others in this technical and unfamiliar area would benefit from the preliminary judgment of a detached referee. Pp. 35-78.

(a) Dredged channels in the Gulf leading to inland harbors, not being raised structures, do not come within the category of "permanent harbour works" forming "an integral part of the harbour system," which are to be considered part of the "coast" under Article 8 of the Convention and therefore that provision does not establish such channels as inland waters. 36-40.

(b) By application of Article 11 to the Louisiana coast the low-tide elevations situated in the territorial sea (here the three-mile grant to Louisiana under the Submerged Lands Act) as measured from bay-closing lines are part of the coastline from which the Act's three-mile grant extends. Pp. 40-47.

(c) Article 7 of the Convention permits (in paragraph 4) a 24-mile maximum closing line for bays and (in paragraph 2) a "semicircle test" for determining the sufficiency of the water area enclosed (which requires that a bay must embrace at least as much water area within its closing line as would be contained in a semicircle with a diameter equal to the length of the closing line). "Outer Vermilion Bay," an area within a closing line from Tigre Point to Shell Keys, does not qualify as a bay under the semicircle test because it would be part of a larger indentation whose closing line far exceeds the 24-mile limit. Pp. 48-52.

(d) "Ascension Bay," whose headlands are jetties at Belle Pass on the west and Southwest Pass on the east, includes the inner bays of the Barataria Bay-Caminada Bay complex which are separated from the outer indentation only by a string of islands across the bays' entrances. Ascension Bay meets the semicircle test when the islands are treated (as provided by Article 7 (3)) "as if they were part of the water area." Pp. 52-53.

(e) Though East Bay does not meet the semicircle test on a closing line between its seawardmost headlands, Louisiana contends that a part of that indentation qualifies as a bay simply because a line can be drawn within it which would satisfy the semicircle test; however, no such area can qualify as a bay unless its own features, not those of the larger indentation, meet the requirements specified in Article 7 (2), as well as the semicircle test therein. Pp. 53-54.

(f) Where islands intersected by a direct closing line between the mainland headlands create multiple mouths to a bay (the situation with respect to the Lake Pelto-Terrebonne Bay-Timbalier Bay complex), the bay should be closed by lines between the natural entrance points on the islands, even if those points are landward of the direct line between the mainland entrance points. Pp. 54-60.

(g) The Convention does not prohibit the drawing of bay-closing lines to islands where (as is true of much of the Louisiana coast) insular configurations really are "part of the mainland"; and it is left to the Special Master initially to determine whether islands which Louisiana has designated as headlands of bays are so integrally related to the mainland as realistically to be parts of the "coast" within the meaning of the Convention. Pp. 60-66.

(h) Fringes or chains of islands are treated the same as other islands and are not taken into account as enclosing inland waters unless under Article 4 the coastal nation decides in the conduct of its international affairs to draw straight baselines joining appropriate points. The United States within its discretion has decided not to draw straight baselines along the Louisiana coast, and this exercise of discretion is not appropriately subject to review by the Court. Pp. 66-73.

(i) The Court leaves to the Special Master the task of determining whether any of the Louisiana coastal waters are "historic bays" within the meaning of Article 7 (6), and the Special Master should consider state exercises of dominion as relevant to the existence of historic title. Pp. 74-78.

Victor A. Sachse and *J. B. Miller,* Special Assistant Attorneys General of Louisiana, argued the State of Louisiana's motion for entry of supplemental decree. With them on the briefs were *Jack P. F. Gremillion,* Attorney General, *Paul M. Hebert, Thomas W. Leigh, Robert F. Kennon, W. Scott Wilkinson, J. J. Davidson, Oliver P. Stockwell, Frederick W. Ellis,* and *Anthony J. Correro III,* Special Assistant Attorneys General, and *John L. Madden,* Assistant Attorney General.

Archibald Cox argued for the United States on cross-motion for supplemental decree as to the State of Louisiana. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Martz, Louis F. Claiborne, Roger P. Marquis,* and *George S. Swarth.*

MR. JUSTICE STEWART delivered the opinion of the Court.

In *United States* v. *Louisiana,* 363 U. S. 1, the Court held that by the Submerged Lands Act of 1953[1] the United States had quitclaimed to Louisiana the lands underlying the Gulf of Mexico within three geographical miles of the coastline.[2] The United States was declared

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[1] 67 Stat. 29, 43 U. S. C. §§ 1301-1315.

[2] The Submerged Lands Act was enacted in response to the Court's decisions in *United States* v. *California,* 332 U. S. 19,

entitled to the lands further seaward. In the decree, as in the Submerged Lands Act, "coast line" was defined as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."[3] We reserved jurisdiction "to entertain such further proceedings, enter such orders and issue such writs as may . . . be deemed necessary or advisable to give proper force and effect to this decree."[4] Before the Court now are cross-motions by the United States and Louisiana[5] for a supplemental decree designating the boundary of the lands under the Gulf owned by Louisiana.[6] The segments of that boundary line that

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United States v. *Texas*, 339 U. S. 707, and *United States* v. *Louisiana*, 339 U. S. 699, that the States did not own the submerged lands off their coasts and that the United States had paramount rights in such lands. After enactment of the Submerged Lands Act, the United States commenced this action against Louisiana, invoking our original jurisdiction under Art. III, § 2, of the Constitution, and seeking a declaration that it was entitled to exclusive possession of and power over the lands underlying the Gulf of Mexico more than three geographical miles from the coast.

[3] 364 U. S. 502, 503; 43 U. S. C. § 1301 (c).

[4] 364 U. S., at 504.

[5] By order of the Court, the United States' original suit against Louisiana was broadened to include the other Gulf States as defendants. 354 U. S. 515. In connection with the supplemental decrees now proposed by the United States and Louisiana, Texas and Mississippi have filed motions seeking an order eliminating from consideration any issue with respect to the lateral boundaries between Louisiana and those States. While we have found it unnecessary to enter any such formal order, it is evident that the decree which will be entered at this stage of the case will decide only the rights of Louisiana and the United States and will not affect any lateral boundaries between the States.

[6] A supplemental decree was entered in 1965 with the consent of the parties removing several large areas from dispute. The decree also directed an accounting and distribution of funds collected from

lie three miles outward from "that portion of the coast which is in direct contact with the open sea" are for the most part easily determinable. The controversy here is primarily over the location of that part of the coastline that consists of "the line marking the seaward limit of inland waters."

More than three years ago, in *United States* v. *California*, 381 U. S. 139, we held that Congress had left to the Court the task of defining "inland waters," and we adopted for purposes of the Submerged Lands Act the definitions contained in the international Convention on the Territorial Sea and the Contiguous Zone, ratified by the United States in 1961.[7] The United States asserts that the same definitions should determine the location of the "line marking the seaward limit of inland waters" of Louisiana. Louisiana, on the other hand, contends that this line has already been determined pursuant to an 1895 Act of Congress which directed the drawing of "lines dividing the high seas from rivers, harbors and

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those areas under the 1956 Interim Agreement between the parties governing the administration of disputed areas. 382 U. S. 288.

[7] [1964] 15 U. S. T. (pt. 2) 1607, T. I. A. S. No. 5639. The Convention was the culmination of long years of work by the International Law Commission. Established by the United Nations General Assembly in 1947 to codify international law, the Commission began deliberations on the regime of the territorial sea in 1952 on the basis of a report submitted by the special rapporteur. At its eighth session in 1956 the Commission adopted a final report, which contained a proposed international convention and recommended the convocation of an international conference to examine further the law of the sea. The General Assembly adopted that recommendation and in 1958 convened the First U. N. Conference on the Law of the Sea in Geneva. With the International Law Commission report as its model, the Conference promulgated the Convention on the Territorial Sea and the Contiguous Zone and three other conventions dealing with other problems of international maritime law. See 1 A. Shalowitz, Shore and Sea Boundaries 203–211 (1962).

inland waters," and has proposed a decree based upon this contention. Alternatively, Louisiana argues that, even assuming the applicability of the definitions contained in the Convention on the Territorial Sea and the Contiguous Zone, the decree proposed by the United States reflects too restrictive a construction of the Convention's provisions in derogation of relevant principles of international law.

I.

THE "INLAND WATER LINE."

Comprehensive congressional regulation of maritime navigation began with the Act of April 29, 1864,[8] which promulgated rules applicable to all vessels of domestic registry on any waters. These rules were patterned on emerging international standards, and when most other maritime nations subsequently changed their rules, the United States Congress in 1885 enacted conforming "Revised International Rules and Regulations" to govern American ships "upon the high seas and in all coast waters of the United States, except such as are otherwise provided for." [9] The 1864 Act was therefore repealed except as to navigation "within the harbors, lakes, and inland waters of the United States." [10] In 1889 the International Maritime Conference drafted new International Rules, which were promptly adopted by Congress.[11] Article 30 of those rules provided that "[n]othing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbor, river, or inland waters." [12]

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[8] 13 Stat. 58, codified as R. S. § 4233.

[9] Act of March 3, 1885, 23 Stat. 438.

[10] 23 Stat. 442.

[11] Act of August 19, 1890, 26 Stat. 320.

[12] 26 Stat. 328.

The United States already had in the 1864 Act such special inland rules for ships of American registry. In order to clarify the areas and ships to which the International and Inland Rules would respectively apply,[13] Congress in 1895 provided that the rules of the 1864 Act were to govern the navigation of *all* vessels "on the harbors, rivers and inland waters of the United States." [14] The 1895 Act went on to provide:

> "The Secretary of the Treasury is hereby authorized, empowered and directed from time to time to designate and define by suitable bearings or ranges with light houses, light vessels, buoys or coast objects, the lines dividing the high seas from rivers, harbors and inland waters."

The authority thus vested in the Secretary of the Treasury has since been transferred several times to various federal officials and now resides with the Commandant of the Coast Guard; [15] and from time to time the lines authorized by the 1895 Act have been designated along portions of the United States coast. When the Submerged Lands Act was passed in 1953, such lines had been drawn in the Gulf only along some segments of the

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[13] The Inland Rules are now codified at 33 U. S. C. §§ 152-232 and the International Rules at 33 U. S. C. §§ 1051-1094.

[14] Act of February 19, 1895, 28 Stat. 672.

[15] The authority given to the Secretary of the Treasury in the 1895 Act was successively transferred: (1) to the Secretary of Commerce and Labor (Act of February 14, 1903, 32 Stat. 829), later redesignated "Secretary of Commerce" (Act of March 4, 1913, 37 Stat. 736); (2) to the Commandant of the Coast Guard (Reorganization Plan No. 3 of 1946, 60 Stat. 1097); (3) to the Secretary of the Treasury (or to the Secretary of the Navy when the Coast Guard is operating in that department (Reorganization Plan No. 26 of 1950, 64 Stat. 1280)), and delegated by the Secretary of the Treasury to the Commandant of the Coast Guard (Treasury Department Order of July 31, 1950, 15 Fed. Reg. 6521). Section 6 (b)(1) of the

Louisiana shore,[16] but in that year the Commandant of the Coast Guard drew new lines applicable to all the waters off the Louisiana coast.[17] In 1954 the Louisiana Legislature declared that it "accepted and approved" this demarcation, which it now calls the "Inland Water Line," as its boundary.[18] Louisiana now argues that this line encloses inland waters and is therefore "the line marking the seaward limit of inland waters," and thus its "coastline" within the meaning of the Submerged Lands Act.[19]

Louisiana argues initially that the 1895 Act is *in pari materia* with the Submerged Lands Act. Congress, it is said, must have contemplated that a technical term such as "inland waters" should have the same meaning in different statutes. The phrase appears, however, in quite different contexts in the two pieces of legislation. While the Submerged Lands Act established boundaries between the lands of the States and the Nation, Congress' only concern in the 1895 Act was with the problem of navigation in waters close to this Nation's shores. There is no evidence in the legislative history that it was the purpose of Congress in 1953 to tie the meaning of the phrase "inland waters" to the 1895 statute. For

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Department of Transportation Act, 80 Stat. 938, transferred this authority to the Secretary of Transportation, effective April 1, 1967 (Exec. Order No. 11340, March 30, 1967, 32 Fed. Reg. 5453); it was again delegated to the Commandant of the Coast Guard, effective April 1, 1967 (49 CFR § 1.4 (a)(2), 32 Fed. Reg. 5606).

[16] 12 Fed. Reg. 8458, 8460 (1947).

[17] 18 Fed. Reg. 7893 (1953).

[18] Louisiana Act No. 33 of 1954. The "Inland Water Line" is delineated on the map of the Louisiana coast appended to this opinion, following p. 78.

[19] In *United States* v. *California*, 381 U. S. 139, neither party suggested to the Court that the "Inland Water Line" had any relevance to the Submerged Lands Act. Indeed, both specifically disclaimed any reliance on it.

instance, during the Senate Committee hearings on the Submerged Lands Act, the following exchange took place between Senator Anderson and the Assistant Attorney General of Louisiana:

> "Senator ANDERSON. Was there not a so-called Government line drawn along the coast of Louisiana?
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> "Mr. MADDEN. Only a partial line, Senator. I remember the old statute that authorized, I believe it was first the Secretary of Commerce, or the Treasury, to fix a line to show the demarcation between inland waters and the high seas. I think the Coast Guard has attempted to draw a partial line over on the east side of Louisiana.
>
> "Senator ANDERSON. We went through all that in the hearing a couple of years ago, and found that was of no value to us whatsoever."[20]

Louisiana's position that the Submerged Lands Act must necessarily be read as referring to the 1895 Act is thus not tenable.[21] After a lengthy review of the legislative history of the Submerged Lands Act in *United States* v. *California,* we reached the conclusion that Congress deliberately "chose to leave the definition of inland waters where it found it—in the Court's hands." 381 U. S., at 157. We adhere to that view, and turn to Louisiana's other arguments in support of the "Inland Water Line."

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[20] Hearings on S. J. Res. No. 13 and other bills before the Senate Committee on Interior and Insular Affairs, 83d Cong., 1st Sess., 276 (1953). In hearings on proposed submerged lands legislation in earlier Congresses, representatives of Louisiana had argued to Congress that the Administration bills were "in error" because they overlooked the fact that, by the "Inland Water Line," "the inland waters of coastal States have already been defined and divided." Hearings on S. 155 and other bills before the Senate Committee on Interior and Insular Affairs, 81st Cong., 1st Sess., 194 (1949). See also *id.*, at 179-180; Hearings on H. R. 5991 and H. R. 5992 before Subcommittee No. 1 of the House Committee on the Judiciary, 81st Cong., 1st Sess., 74-75 (1949).

[21] Also without substance is Louisiana's claim that the United States cannot alter the boundary adopted by Louisiana in 1954. The question before us is the location of the boundary of land quitclaimed to Louisiana by the United States in 1953, and that question is of course not affected by any subsequent action of the Louisiana

We further decided in *United States* v. *California* that the provisions of the Convention on the Territorial Sea and the Contiguous Zone were "the best and most workable definitions available," 381 U. S., at 165, and we adopted them for purposes of the Submerged Lands Act. Yet Louisiana asserts that the Court is not precluded by the *California* decision from adopting the "Inland Water Line" in this case. Essentially the argument is that the Convention was not intended either to be the exclusive determinant of inland or territorial waters or to divest a nation of waters which it had long considered subject to its sole jurisdiction. By the long-standing, continuous, and unopposed exercise of jurisdiction to regulate navigation on waters within the "Inland Water Line," the United States is said to have established them as its inland waters under traditional principles of international law. Alternatively, Louisiana suggests that, even assuming the exclusivity of the Convention on the Territorial Sea and the Contiguous Zone, the "Inland Water Line," by virtue of this assertion of sovereignty, has created "historic bays" within the exception of

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Legislature. As we stated in an earlier dispute between these parties, "[w]e intimate no opinion on the power of a State to extend, define, or establish its external territorial limits or on the consequences of any such extension *vis à vis* persons other than the United States or those acting on behalf of or pursuant to its authority. The matter of state boundaries has no bearing on the present problem." *United States* v. *Louisiana,* 339 U. S. 699, 705.

Article 7 of the Convention.[22] We have concluded, however, that nothing in either the enactment of the 1895 Act or its administration indicates that the United States has ever treated that line as a territorial boundary.

Under generally accepted principles of international law, the navigable sea is divided into three zones, distinguished by the nature of the control which the contiguous nation can exercise over them.[23] Nearest to the nation's shores are its inland, or internal waters. These are subject to the complete sovereignty of the nation, as much as if they were a part of its land territory, and the coastal nation has the privilege even to exclude foreign vessels altogether. Beyond the inland waters, and measured from their seaward edge, is a belt known as the marginal, or territorial, sea.[24] Within it the coastal nation may exercise extensive control but cannot deny the right of innocent passage to foreign nations.[25]

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[22] Article 7 sets forth precise mathematical requirements which bays must satisfy to qualify as inland waters from whose seaward edge the territorial sea extends. See *infra*, at 48; n. 64, at 49; 52, n. 68; 54–55. Paragraph 6 of the Article provides, however, that "[t]he foregoing provisions shall not apply to so-called 'historic' bays . . . ."

[23] On the threefold division of the sea, see generally L. Bouchez, The Regime of Bays In International Law 4–5 (1964); 1 Shalowitz, *supra*, n. 7, at 22–24; M. Strohl, The International Law of Bays 3–4 (1963).

[24] The breadth of the territorial sea varies from country to country, depending on the claims of the coastal state. These claims have long been so diverse that the Geneva Conference was unable to agree upon a uniform distance for purposes of the Convention on the Territorial Sea and the Contiguous Zone. A table illustrating the various territorial sea claims of most nations appears at 1 Shalowitz, *supra*, n. 7, at 389 (App. J.).

[25] Article 14 of the Convention on the Territorial Sea and the Contiguous Zone provides that "ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea."

Outside the territorial sea are the high seas, which are international waters not subject to the dominion of any single nation.[26]

Whether particular waters are inland has depended on historical as well as geographical factors. Certain shoreline configurations have been deemed to confine bodies of water, such as bays, which are necessarily inland. But it has also been recognized that other areas of water closely connected to the shore, although they do not meet any precise geographical test, may have achieved the status of inland waters by the manner in which they have been treated by the coastal nation. As we said in *United States* v. *California,* it is generally agreed that historic title can be claimed only when the "coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations." 381 U. S., at 172.[27]

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[26] Article 2 of the Convention on the High Seas provides: "The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty." [1962] 13 U. S. T. (pt. 2) 2313, T. I. A. S. No. 5200. It has, however, generally been thought that the coastal nation can exercise some limited jurisdiction over ships beyond its territorial waters. See, *e. g.,* M. McDougal & W. Burke, The Public Order of the Oceans, c. 6 (1962); P. Jessup, The Law of Territorial Waters and Maritime Jurisdiction 75–112 (1927); 1 Shalowitz, *supra,* n. 7, at 27. The Convention on the Territorial Sea and the Contiguous Zone has recognized that such extensions of jurisdiction are sometimes imperative and has provided that in a contiguous zone not to exceed 12 miles from the coast, the littoral nation "may exercise the control necessary to: (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea; (b) Punish infringement of the above regulations committed within its territory or territorial sea." Article 24.

[27] A recent United Nations study recommended by the International Law Commission reached the following conclusions:

"There seems to be fairly general agreement that at least three factors have to be taken into consideration in determining whether a State has acquired a historic title to a maritime area. These factors are: (1) the exercise of authority over the area by the

While there is not complete accord on the definition of historic inland waters,[28] it is universally agreed that the reasonable regulation of navigation is not alone a sufficient exercise of dominion to constitute a claim to historic inland waters. On the contrary, control of navigation has long been recognized as an incident of the coastal nation's jurisdiction over the territorial sea. Article 17 of the Convention on the Territorial Sea and the Contiguous Zone embodies this principle in its declaration that "[f]oreign ships exercising the right of innocent passage [in the territorial sea] shall comply with the laws and regulations enacted by the coastal State . . . and, in particular, with such laws and regulations relating to transport and navigation." [29]

State claiming the historic right; (2) the continuity of this exercise of authority; (3) the attitude of foreign States. First, the State must exercise authority over the area in question in order to acquire a historic title to it. Secondly, such exercise of authority must have continued for a considerable time; indeed it must have developed into a usage. More controversial is the third factor, the position which the foreign States may have taken towards this exercise of authority. Some writers assert that the acquiescence of other States is required for the emergence of an historic title; others think that absence of opposition by these States is sufficient." Juridical Regime of Historic Waters, Including Historic Bays, [1962] 2 Y. B. Int'l L. Comm'n 1, 13, U. N. Doc. A/CN.4/143 (1962).

See also Bouchez, *supra*, n. 23, at 203, 281.

[28] Historic title can be obtained over territorial as well as inland waters, depending on the kind of jurisdiction exercised over the area. "If the claimant State exercised sovereignty as over internal waters, the area claimed would be internal waters, and if the sovereignty exercised was sovereignty as over the territorial sea, the area would be territorial sea." Juridical Regime of Historic Waters, Including Historic Bays, *supra*, n. 27, at 23.

[29] Modern authorities are unanimous on this principle. Thus, Jessup states that "[i]t seems clear that even transient vessels must obey reasonable rules and regulations laid down by the littoral state in the interests of safety of navigation and maritime police." And

Because it is an accepted regulation of the territorial sea itself, enforcement of navigation rules by the coastal nation could not constitute a claim to inland waters

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he cites the United States Inland Rules as an example of such regulation of the territorial sea. Jessup, *supra*, n. 26, at 121, 122, n. 37. Shalowitz also concludes that the right of innocent passage through the territorial sea "may be conditioned upon the observance of special regulations laid down by the coastal nation for the protection of navigation . . . and other local interests." 1 Shalowitz, *supra*, n. 7, at 23. See also Boggs, Delimitation of the Territorial Sea, 24 Am. J. Int'l L. 541, 542 (1930); 3 G. Gidel, Le Droit International Public de la Mer 633 (1934); Strohl, *supra*, n. 23, at 273, 275.

J. Griffin, The American Law of Collision (1949) is said by Louisiana to be to the contrary. Referring to the "Inland Water Line," the author states that "[t]he Inland Rules apply to vessels of any nationality, since the United States has full jurisdiction over the waters in question." *Id.*, at 11–12. It is clear, however, that the jurisdiction to which the author refers is not the total sovereignty of a coastal nation over its inland waters, but rather the control of the territorial sea. Thus, he notes earlier that the Inland Rules govern "cases arising on *coastal and inland* waters of the United States which are subject to *admiralty jurisdiction*." *Id.*, at 8. (Emphasis supplied.)

This international understanding is not a recent development. At the time Congress enacted the Inland and International Rules, there was also no dispute about a coastal nation's power to regulate navigation in its territorial sea. At the 1895 meeting of the International Law Association, Rules Relating to the Territorial Sea were adopted. A six-mile territorial sea was agreed upon, in which all nations would have the right of innocent passage. Article 7 then provided:

> "Ships which pass through territorial waters shall conform to the special regulations decreed by the littoral State in the interest and for the security of navigation or as matter of maritime police."

Report of the Seventeenth Conference of the International Law Association held in Brussels, October 1895 (1896), excerpted in H. Crocker, Extent of the Marginal Sea 178 (1919). An identical article had been approved in 1894 by the Institute of International Law at Paris. *Id.*, at 149. And individual authors of the day often from whose seaward border the territorial sea is measured.[30]

But even if a nation could base a claim to historic inland waters on its continuous regulation of naviga-

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expressed this principle. See the following works excerpted in Crocker: Bluntschli, Le Droit International Codifié (5th ed. 1895), in Crocker, at 10; Calvo, Le Droit International Théorique et Pratique (5th ed. 1896), in Crocker, at 33; Fiore, International Law Codified and Its Legal Sanction, or The Legal Organization of the Society of States (1918), in Crocker, at 58; Latour, La Mer Territoriale au Point de Vue Théorique et Pratique (1889), in Crocker, at 237–238; Von Liszt, Das Völkerrecht (5th ed. 1907), in Crocker, at 293; Nuger, Des Droits de l'État sur la Mer Territoriale (1887), in Crocker, at 304; Perels, Manuel de Droit Maritime International (1884), in Crocker, at 352–353; Schücking, Das Küstenmeer im Internationalen Rechte (1897), in Crocker, at 436–437.

The 1930 Conference at The Hague also had no doubt of the power of the coastal nation to regulate navigation in the territorial sea. Article 6 of its proposed codification stated:

> "Foreign vessels exercising the right of passage shall comply with the laws and regulations enacted in conformity with international usage by the coastal State, and, in particular, as regards:
>
> "(a) The safety of traffic and the protection of channels and buoys . . . ."

And the commentary to this Article stated that "[i]nternational law has long recognised the right of the coastal State to enact, in the general interest of navigation, special regulations applicable to vessels exercising the right of passage through the territorial sea." 3 Acts of the Conference for the Codification of International Law, Territorial Waters 214 (1930).

[30] The recent United Nations study of the concept of historic waters concluded that "if the claimant State allowed the innocent passage of foreign ships through the waters claimed, it could not acquire an historic title to these waters as internal waters, only as territorial sea." Juridical Regime of Historic Waters, Including Historic Bays, *supra*, n. 27, at 23. Under that test, since the United States has not claimed the right to exclude foreign vessels from within the "Inland Water Line," that line could at most enclose historic territorial waters.

tion,[31] it is clear that no historic title can accrue when the coastal nation disclaims any territorial reach by such an exercise of jurisdiction. For at least the last 25 years, during which time Congress has twice re-enacted both the International and Inland Rules,[32] the responsible officials have consistently disclaimed any but navigational significance to the "Inland Water Line." When the line was for the first time completed off the entire Louisiana shore, the Commandant of the Coast Guard declared:

> "The establishment of descriptive lines of demarcation is solely for purposes connected with navigation and shipping. . . . These lines are not for the purpose of defining Federal or State boundaries, nor do they define or describe Federal or State jurisdiction over navigable waters." [33]

As early as 1943 the Coast Guard had differentiated the "Inland Water Line" from other boundaries with territorial significance. Its manual on Admiralty Law Enforcement, published that year, discussed the principles of international law relating to the definitions and jurisdictional attributes of inland waters, the territorial sea, and the high seas. The manual then contrasted the line drawn under the 1895 Act.

> "NAVIGATION RULE: Now let us consider another line of demarcation. As shown in Chapter V, there are different rules for navigation on the 'inland waters' and the 'high seas': the Inland Rules and the International Rules. But here we

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[31] Cf. Bouchez, *supra*, n. 23, at 227, 249; Strohl, *supra*, n. 23, at 293.

[32] Inland Rules: Act of May 21, 1948, 62 Stat. 249; Act of August 8, 1953, 67 Stat. 497. International Rules: Act of October 11, 1951, 65 Stat. 406; Act of September 24, 1963, 77 Stat. 194.

[33] 18 Fed. Reg. 7893 (1953).

> do not apply the previous definition, but adopt a new one for convenience. The Secretary of Commerce has fixed a series of lines along our coast, lines not following the natural curvature of our shores, and not following any three-mile natural perimeter, and the Inland Rules apply inside this line, while the International Rules apply outside the line. . . .
>
> "Quite obviously, this artificial line does not truly separate the high seas from the inland waters of the United States. It simply marks the area within which the Inland Rules apply, and outside of which the International Rules control."[34]

In *United States* v. *California* we held that the United States' disclaimer to the Court of any historic title was decisive in the light of the "questionable evidence of continuous and exclusive assertions of dominion over the disputed waters." 381 U. S., at 175. In this case, not only are there long-standing, extrajudicial disclaimers of historic title, but also the United States has never treated the "Inland Water Line" as delimiting an area within which it can exercise jurisdiction over anything but navigation.[35]

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[34] Admiralty Law Enforcement 25–26 (1943). See also the Coast Guard Law Enforcement Manual 3–7 (1954):

"The dividing line between inland and international waters as established by the Commandant, found in 33 CFR 82, is used only for the purpose of the Rules of the Road, and the enforcement of the inland rules of the road. It has no connection with territorial waters, or high seas, or other terms denoting general jurisdiction."

The manual Selected Materials on Coast Guard Law Enforcement 4–5 (1964) is to the same effect:

"The line established by the Commandant of the Coast Guard has no significance with respect to or dependence on the line establishing the limit of the territorial waters of the United States. In some places, the line is inshore of the territorial waters of the United States while in others, the line extends well outside the territorial limits of the United States. The sole purpose of the line is to establish a division line between the application of the Inland Rules and the International Rules of the Road."

And in the Commandant's most recent proposal to change the line for the Gulf of Mexico, he observed that "[t]he existing Gulf demarcation line extends about 20 miles out into international waters, as recognized by the State Department." He noted that the proposed "relocation of the line well within territorial waters removes any question of International Law." 32 Fed. Reg. 8763 (1967).

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[35] Judicial and lay opinion have agreed on the limited significance of the "Inland Water Line." In discussing the line in *United States* v. *Newark Meadows Imp. Co.*, 173 F. 426, 428, Judge Hough, of the Circuit Court for the Southern District of New York, said in 1909:

> "This legislation [the 1895 Act], however, was for the purpose of delimiting the inland waters of the United States, in order to inform navigators where the inland rules of navigation, as distinguished from the international rules, become applicable. It does not purport to change the boundaries of any federal district, nor enlarge the jurisdiction of any particular federal court . . . ."

Louisiana relies on the decision of this Court in *The Delaware,* 161 U. S. 459, where it was held that the Inland Rules should govern a collision in the Gedney Channel off New York Harbor. Referring to the "Inland Water Line," the Court stated that the enclosed waters were "as much a part of the inland waters of the United States *within the meaning of this act* as the harbor within the entrance." 161 U. S., at 463. (Emphasis supplied.) The italicized qualification indicates the Court's understanding of the limited import of the "Inland Water Line."

Writers who have considered the question are unanimous that the "Inland Water Line" serves only the purpose for which it was authorized. Thus, 1 Shalowitz, *supra,* n. 7, at 23, cautions that the

> "physiographic concept of the limits of inland waters should not be confused with the lines established by the United States Coast Guard to separate the areas where the Inland Rules of the Road apply from those to which the International Rules apply. These lines are established for administrative purposes and have been held to have no application other than the specific purpose of determining what rules of navigation are to be followed."

Similarly, Strohl, *supra,* n. 23, at 4, n. 5, warns that

> "[c]are should be exercised not to confuse the term 'internal waters' in the context of [international territorial law] with the term 'inland

There is no indication that in enacting the navigation rules and authorizing the designation of an "Inland Water Line" Congress believed it was also determining the Nation's territorial boundaries.[36] Indeed, it seems unlikely that Congress, if it had intended that result, would have delegated such authority to the Secretary of the Treasury, to be exercised in his discretion "from time to time" and by reference to navigational aids rather than in accordance with prevailing principles of international law. Consistently with their limited statutory purpose, the lines have always been drawn, and

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waters' as used by mariners entering United States coastal waters, where in certain localities they are required to operate under what are called Inland Rules of the Road. . . . The boundary lines for 'Inland Waters' within the meaning of United States Inland Rules of the Road do not necessarily coincide with the base lines delimiting the regime of internal waters as understood in general international law."

[36] On the contrary, the titles of the Acts and statements in the legislative history illustrate that Congress' only concern was with the regulation of navigation. *E. g.*, S. Ex. Doc. No. 35, 53d Cong., 3d Sess., 2 (1895). The provision for the delineation of an "Inland Water Line" was an afterthought, added "at the request of the maritime interests of New York and Philadelphia." 27 Cong. Rec. 2059 (1895).

Louisiana argues that since Article 30 of the 1889 International Marine Conference excepted from the International Rules only special rules for "inland waters," the Conference and Congress must have believed that the power of the coastal nation extended only to those excepted areas. It is clear, however, that both the Conference and Congress recognized the already prevailing principle of international law (see *supra*, n. 29) that the coastal nation had the power to regulate navigation in the territorial sea. But they decided that it would be preferable to have standard international rules, insofar as practicable, on all navigable waters, since there were rarely well-marked lines dividing national waters from the high seas. See Protocols of Proceedings of the International Marine Conference in Washington, D. C., in 1889, S. Ex. Doc. No. 53, 51st Cong., 1st Sess., 21–22, 25, 65–66, 127–128, 579, 730 (1890); H. R. Rep. No. 731, 48th Cong., 1st Sess., 2 (1884).

frequently altered, solely with regard to contemporary navigational needs.[37] And in the only instance called to our attention in which the "Inland Water Line" was

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[37] There have been, for example, several recent changes in the lines. See, *e. g.*, 31 Fed. Reg. 4401, 10322 (1966); 32 Fed. Reg. 7127 (1967); 33 Fed. Reg. 8273 (1968). The stated purpose of one of the 1966 changes was "to bring the regulations up to date with identification of aids to navigation." 31 Fed. Reg. 4401. When the Commandant of the Coast Guard proposed the 1953 changes in the "Inland Water Line" across the Gulf coast, he noted that "[t]hese lines are based on the needs of safety in navigation." 18 Fed. Reg. 2556 (1953). And when the 1953 line was finally adopted, he stated:

"The comments, data, and views submitted which were based on reasons not directly connected with promoting safe navigation were rejected.

"The establishment of descriptive lines of demarcation is solely for purposes connected with navigation and shipping." 18 Fed. Reg. 7893 (1953).

Similarly, when the Commandant proposed changes in the line in 1967, his reason was that "[t]he present demarcation line is not easily located and therefore is not serving its purpose of informing mariners about the rules of the road applicable to their present positions." 32 Fed. Reg. 8763 (1967). The proposed modifications were withdrawn after extended hearings. The notice of withdrawal contained the following comment on some of the evidence adduced at those hearings:

"A number of comments and views submitted did not address themselves to the purpose for which the line of demarcation is authorized under 33 U. S. Code 151, but to other subjects, including State boundaries, State rights, fishing rights, etc. These comments and views were not considered as germane to the proposals under consideration and no action is taken with respect thereto." 32 Fed. Reg. 14775 (1967).

The only alleged departure from this construction of the "Inland Water Line" is one in a set of Coast Guard orders of May 20, 1925 (*i. e.*, during the Prohibition Era), purporting to authorize law enforcement in the "territorial waters" of the United States. "Territorial waters" were defined as comprising

"all waters within a radius of three nautical miles from the 'coast' of the United States . . . and all waters inshore of the lines desigmentioned by the United States in its international relations, the State Department in 1929 cautioned that the "lines do not represent territorial boundaries, but are for navigational purposes." [38] We must therefore reject Louisiana's contention that the United States has historically treated the "Inland Water Line" as the territorial boundary of its inland waters.[39]

Finally, Louisiana argues that only adoption of the current "Inland Water Line" will fulfill the "requirements of definiteness and stability which should attend any congressional grant of property rights belonging to the United States." *United States* v. *California,* 381 U. S. 139, 167. Any line drawn by application of the rules of the Convention on the Territorial Sea and the Contiguous Zone would be ambulatory and would vary with the frequent changes in the shoreline. This will lead, it is said, to continuing uncertainty and endless litigation concerning the location of the Louisiana coast-

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nated and defined by the Secretary of Commerce . . . as limiting the 'inland waters' of the United States."

This definition is found in a Coast Guard manual for official use only entitled Law Enforcement at Sea relative to Smuggling 2 (1932). While the orders do attach to the "Inland Water Line" a jurisdictional significance beyond the regulation of navigation, they do not support Louisiana's position. The orders clearly equated "inland waters" to the territorial sea.

[38] Letter from W. R. Castle, Jr., to Chargé Lundh, July 13, 1929, in 1 G. Hackworth, Digest of International Law 645 (1940).

[39] Louisiana argues that the jurisdictional significance of the "Inland Water Line" is evidenced by its adoption by Congress in several other Acts. Officers Competency Certificates Act, 53 Stat. 1049, 46 U. S. C. § 224a (12)(a); Coastwise Load Line Act, 49 Stat. 888, 46 U. S. C. § 88; Act for inspection of seagoing vessels, 49 Stat. 1544, 46 U. S. C. § 367. In all of these statutes, however, the "Inland Water Line" is adopted as the line *seaward* of which the provisions are to apply. Consequently they do not represent an exercise of jurisdiction over inland waters.

line under the Submerged Lands Act, because the shoreline is constantly shifting as the Mississippi River and violent Gulf storms remold the soft, silt-like delta soil. This problem was not encountered on the rock-hard, comparatively straight California coast, and Louisiana contends that there is nothing in the Submerged Lands Act which requires that inland waters be given the same definition for every part of the United States coast.[40] Just as the Court was free in *United States* v. *California* to adopt the definition which best solved the problems of that case, the argument concludes, we are free in this case to adopt a different definition more suited to the peculiarities of the highly unstable Louisiana shore.

We do not, however, so broadly construe our function under the Submerged Lands Act. Our adoption in

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[40] One congressional committee report in 1953 concluded that perhaps the definition of inland waters could not be uniform, particularly as to Louisiana:

"The hearings in Louisiana were particularly revealing in regard to the weight which should be given to geographical factors. The trip our subcommittee took by air over the shore and coastal area of Louisiana was highly informative on this score. There is a startling difference between the shore and coast line of Louisiana and Florida on the one hand and that of Texas and California, on the other hand. To say that these contrasting coastal areas should be treated exactly alike with reference to the definition of inland waters would ignore geographical factors that are wholly different."

Report of the House Committee on Interior and Insular Affairs, pursuant to H. R. Res. No. 676 authorizing an Investigation and Study of the Seaward Boundaries of the United States, H. R. Rep. No. 2515, 82d Cong., 2d Sess., 19 (1953). The recommendation of that study, however, was that Congress should adopt general guidelines for the definition of inland waters and then delegate the task of drawing exact boundaries to a special commission, an approach which Congress rejected in the Submerged Lands Act. The Attorney General also urged Congress to draw "[a]n actual line on a map" in defining state boundaries to avoid uncertainty and expensive litigation. Hearings on S. J. Res. No. 13, *supra*, n. 20, at 926 (1953). This approach was also rejected in the statute as enacted.

United States v. *California* of the definitions contained in the Convention on the Territorial Sea and the Contiguous Zone was "for purposes of the Submerged Lands Act," and not simply for the purpose of delineating the California coastline. Congress left to this Court the task of defining a term used in the Act, not of drawing state boundaries by whatever method might seem appropriate in a particular case. It would be an extraordinary principle of construction that would authorize or permit a court to give the same statute wholly different meanings in different cases, and it would require a stronger showing of congressional intent than has been made in this case to justify the assumption of such unconfined power. Finally, we note that if the inconvenience of an ambulatory coastline proves to be substantial, there is nothing in this decision which would obstruct resolution of the problems through appropriate legislation or agreement between the parties. Such legislation or agreement might, for example, freeze the coastline as of an agreed-upon date.

Even if we were free to adopt varying definitions of inland waters for different portions of the United States coast, we are not convinced that the policy in favor of a certain and stable coastline, strong as it is, would necessarily outweigh countervailing policy considerations under the Submerged Lands Act. We recognized in *California* the desirability of "a single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations." 381 U. S., at 165. The adoption of the "Inland Water Line" for Louisiana would be completely at odds with this desideratum. Moreover, adoption of a new definition of inland waters in this case would create uncertainty and encourage controversy over the coastlines of other States, unsure as to which, if either, of the two definitions would be applied to them. This uncertainty might be compounded by the absence of any "Inland Water Line" around much of the United States. And we cannot assume that, in enacting the Submerged Lands Act, Congress envisioned that the ownership of potentially vast resources might thereafter be determined "from time to time" by the Coast Guard, acting solely in the interest of navigational convenience.

For these reasons, we conclude that that part of Louisiana's coastline which, under the Submerged Lands Act, consists of "the line marking the seaward limit of inland waters," is to be drawn in accordance with the definitions of the Convention on the Territorial Sea and the Contiguous Zone.

II.

APPLICATION OF THE CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE.

Many issues divide the parties concerning the application of the provisions of the Convention on the Territorial Sea and the Contiguous Zone to the Louisiana coast. Some of these issues, which involve simply interpretation of the Convention, we have been able to decide on the basis of the materials now before us. Others, however, are primarily factual questions involving the construction and application of the Convention's provisions with respect to particularized geographical configurations. Several of these factual disputes cannot be properly resolved without evidentiary hearings, and as to others we think it would be wise at all events in this technical and unfamiliar area to have the benefit, preliminarily, of the judgment of a detached referee. Accordingly, we have decided to refer to a Special Master the task of resolving in the first instance several of the particularized disputes over the precise boundary between the submerged Gulf lands belonging to the United States and those belonging to Louisiana.

1. *Dredged channels.* A recurring question in the application of the Convention to the Louisiana coast is whether dredged channels in the Gulf leading to inland harbors comprise inland waters.[41] In support of its contention that dredged channels, as such, are inland waters, Louisiana relies principally on Article 8 of the Convention:

> "For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast."

Incontestably, Louisiana argues, the channels "form an integral part of the harbour system"; that they are "harbour works" as well should also be obvious in light of the enormous cost and effort which the United States has expended in dredging and maintaining them.

The United States argues more convincingly, however, that Article 8 applies only to raised structures. The discussions of the Article by the 1958 Geneva Conference and the International Law Commission reveal that the term "harbour works" connoted "structures" and "installations" which were "part of the land" and which in some sense enclosed and sheltered the waters within.[42] It is not enough that the dredged channels may be an "integral part of the harbour system"; even raised structures which fit that description, such as lighthouses, are not considered "harbour works" unless they are "connected with the coast." [43] Thus, Article 8 provides that

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[41] Eleven such dredged channels have been brought to our attention. Moving from east to west, they appear at (1) the Mississippi River-Gulf Outlet through Breton and Chandeleur Sounds, (2) and (3) South and Southwest Passes of the Mississippi River, (4) the Empire Canal, opening into "Ascension Bay" (see *infra,* at 48), just east of Bastian Bay, (5) the Barataria Bay Waterway through Barataria Bay and into "Ascension Bay," (6) Belle Pass, the arm of Bayou Lafourche just west of Bay Marchand, (7) the Houma Navigation Canal through Terrebonne Bay, (8) the Atchafalaya River Channel through Atchafalaya Bay, (9) the Freshwater Bayou Canal, (10) Calcasieu Pass, and (11) Sabine Pass.

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[42] A member of the International Law Commission gave the following explanation:

"The Commission's rule that jetties and piers be treated as part of the coastline [was] based on the assumption that those installations would be of such a type as to constitute a physical part of such coastline; it would indeed have been inconvenient to treat that kind of installation otherwise than in the manner advocated by the Commission." [1955] 1 Y. B. Int'l L. Comm'n 74.

See also [1956] 1 Y. B. Int'l L. Comm'n 193; [1954] 1 Y. B. Int'l L. Comm'n 88-89.

The same understanding is reflected in the discussions at the 1958 Geneva Conference:

"4. Mr. CARMONA (Venezuela) stressed that the International Law Commission had approved the text of article 8 only after the most exhaustive study. The construction of harbour works being of vital importance not only to the coastal State but also to the ships of all nations, no doubt should be allowed to subsist regarding the status of such works. Governments which had made heavy economic sacrifices to secure their port facilities against the elements had always acted on the assumption that the legal position was precisely as stated in the Commission's text. In those circumstances, any interference with that text might have very serious consequences." United Nations Conference on the Law of the Sea, Official Records, Vol. III: First Committee (Territorial Sea and Contiguous Zone), Summary Records of Meetings and Annexes, U. N. Doc. A/CONF. 13/39, p. 142.

And this view comports with generally accepted definitions of the terms "harbour" and "harbour works." See, *e. g.*, 1 Shalowitz, *supra*, n. 7, at 292:

"*Harborworks.*—Structures erected along the seacoast at inlets or rivers for protective purposes, or for enclosing sea areas adjacent to the coast to provide anchorage and shelter."

See also *id.*, at 60, n. 65; Strohl, *supra*, n. 23, at 71-72.

[43] [1954] 1 Y. B. Int'l L. Comm'n 88.

"harbour works . . . shall be regarded as forming part of the *coast*" (emphasis supplied), a description which hardly fits underwater channels. As part of the "coast," the breadth of the territorial sea is measured from the harbor works' low-water lines, attributes not possessed by dredged channels.[44] We must therefore conclude that Article 8 does not establish dredged channels as inland waters.

Louisiana also contends that the legislative history of the Submerged Lands Act reveals a clear congressional purpose to include such channels as inland waters. Early versions of the bill contained a definition of the term "inland waters" for the purposes of the Act, and that definition included "channels."[45] The definition was later deleted, but Louisiana contends that the sole purpose of the deletion was to avoid a construction of the definition which would exclude other areas from inland waters.[46] In *United States* v. *California,* 381 U. S. 139, 150–160, we reviewed at length the pertinent legislative history and concluded that the only sure inference which could be drawn from the deletion of the definition was that Congress thought the highly technical question should be left to the courts. We remain of that view. Moreover, it is far from clear that the word "channels" in the deleted definition encompassed dredged channels in the open sea. From the context in which the word appears, it is far more likely that the definition referred only to bodies of water bordered by land.[47]

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[44] Article 3 provides as follows:

"Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State."

Louisiana argues that, in view of the proviso "[e]xcept where otherwise provided in these articles," the United States cannot maintain that a dredged channel is not a baseline just because it has no low-water line. Article 8, it is said, is one of the provisions covered by the exception in Article 3. This argument, however, founders on the language of Articles 3 and 8. The exception in Article 3 refers to methods of determining the baseline other than by the low-water mark along the coast. Article 8 does not provide such an alternative method, but merely identifies certain structures which are to be considered part of the coast.

In this regard, the United States points out that if dredged channels were really "part of the coast" within Article 8, their seawardmost extensions could also serve as headlands from which lines closing indentations could be drawn. As the International Law Commission Commentary explained, "[t]he waters of a port up to a line drawn between the outermost installations form part of the internal waters of the coastal State." [1956] 2 Y. B. Int'l L. Comm'n 270. Yet even Louisiana has recognized the inappropriateness of using the ends of such channels as headlands of bays.

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[45] The definition was explained as follows in H. R. Rep. No. 215, 83d Cong., 1st Sess., 4 (1953):

"Section 2 (b) defines 'coastline' which is the baseline from which the State boundaries are projected seaward. It means not only the line of ordinary low water along the coast which directly contacts the open sea but it also means the line marking the seaward limit of inland waters.

"Inland waters include all ports, estuaries, harbors, bays, channels, straits, historic bays, sounds, and also all other bodies of water which join the open sea."

[46] In opposing the definition, Senator Cordon stated:

"I would like to see general language used for general purposes, realizing always the hazards of including a few specific references and thereby excluding others, even when we seek to indicate that there are others." Hearings on S. J. Res. No. 13, *supra,* n. 20, at 1380.

And the report of the Senate Committee on Interior and Insular Affairs on the Submerged Lands Act gave this explanation for its deletion:

"The words 'which include all estuaries, ports, harbors, bays, channels, straits, historic bays, and sounds, and all other bodies of water which join the open sea' have been deleted from the reported bill because of the committee's belief that the question of what constitutes inland waters should be left where Congress finds it. The committee is convinced that the definition neither adds nor takes away anything a State may have now in the way of a coast and the lands underneath waters behind it." S. Rep. No. 133, 83d Cong., 1st Sess., 18 (1953).

2. *The territorial sea of low-tide elevations.* Article 11 of the Convention on the Territorial Sea and the Contiguous Zone deals with the subject of low-tide elevations:

> "1. A low-tide elevation is a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.
>
> "2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own."

The question presented by the application of this provision to the Louisiana coast is whether the territorial sea—or, for purposes of this case, the three-mile grant to Louisiana under the Submerged Lands Act—is to be measured from low-tide elevations which lie within three miles of the baseline across the mouth of a bay but more than three miles from any point on the mainland or an island.[48]

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[47] The bill, H. R. 4198, defined inland waters as including "all estuaries, ports, harbors, bays, channels, straits, historic bays, and sounds, *and all other bodies of water which join the open sea.*" (Emphasis supplied.) The last phrase hardly describes a deepening of water already in the open sea.

[48] The low-tide elevations in question are situated near the mouth of Atchafalaya Bay. Louisiana also argues that the United States

The United States argues that the phrase "at a distance not exceeding the breadth of the territorial sea from the mainland" does not refer to the territorial sea as a *situs*. Rather it uses the width of the territorial sea only as a measurement of *distance*—a circumlocution made necessary by the failure of the 1958 Geneva Con-

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has overlooked some islands within the Bay, and that low-tide elevations within three miles of those islands should be included under Article 11. The United States disputes the existence of the islands or their characterization as such. The question, being one of fact which cannot be resolved on this record, should be decided, if necessary, by the Special Master.

Another factual question which we leave to the Special Master concerns the existence of an artificially created spoil bank at Pass Tante Phine, just to the north of West Bay. Louisiana contends that it is above water at low tide, whereas the United States argues that while it used to be so exposed, it is no longer. If the United States is correct in this assertion, of course the spoil bank forms no part of the coast. The same would be true if the bank were surrounded by water at low tide, for Article 11 of the Convention provides for measuring the territorial sea only from those low-tide elevations which are "naturally-formed area[s]." However, to the extent that the spoil bank is an extension of the mainland and is uncovered at low tide, it must be taken into account in drawing the baseline under Article 3.

The United States contends that the spoil bank should be ignored because its construction was unauthorized; it was created by the Gulf Refining Co. under a 1956 permit which, it is said, authorized the dredging of a channel but not the creation of a spoil bank. Even assuming that the creation of the bank was not authorized (a question on which we express no opinion whatever), it would not follow that it does not constitute part of the coast. If the United States is concerned about such extensions of the shore, it has the means to prevent or remove them. See *United States* v. *California,* 381 U. S. 139, 177. Nor can we accept the United States' argument that a "mere spoil bank" should not be deemed part of the coast because it is not "purposeful or useful" and is likely to be "short-lived." It suffices to say that the Convention contains no such criteria.

ference to agree upon a uniform width.[49] And that distance—three miles in this case—is to be measured from the "mainland," a term which does not comprise baselines across bodies of water but is limited to the low-water mark on dry land. Louisiana, on the other hand, interprets the Article as covering all low-tide elevations situated anywhere within the territorial sea. And the drawing of baselines across the mouths of bays is an integral step in the determination of the area of the territorial sea. Moreover, Louisiana argues, the term "mainland" does include inland waters. The theory of the Convention, it is argued, reflects a long-standing principle of international law—that bays and other inland waters are practically assimilated to the dry land and treated for all legal purposes as if they were a part of it.[50]

The parties agree that Article 11 on its face is not wholly dispositive of the issue, and that the language does not preclude either construction.[51] Each party, therefore, relies on the origins of the Article and the statements of its drafters. When the provision was first proposed to the International Law Commission in 1952, it read as follows:

> "Elevations of the sea bed *situated within the territorial sea,* though only above water at low tide,

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[49] See n. 24, *supra.*

[50] See *supra,* at 22.

[51] The United States suggests that the issue was decided in *United States* v. *California,* for the decree in that case contained this definition of "coast line":

"(a) The line of mean lower low water on the mainland, on islands, and on low-tide elevations lying wholly or partly within three geographical miles from the line of mean lower low water on the mainland or on an island . . . ." 382 U. S. 448, 449.

As the United States concedes, however, the issue now before us was not presented by the *California* case; hence, nothing in that decision controls its resolution.

> are taken into consideration for the determination of the base line of the territorial sea."[52] (Emphasis supplied.)

After several amendments to the rapporteur's draft,[53] the Commission in 1954 adopted a version with substantially the same meaning:

> "Drying rocks and shoals *which are wholly or partly within the territorial sea* may be taken as points of departure for delimiting the territorial sea."[54] (Emphasis supplied.)

As the discussion made clear, both drafts of the Article covered *all* low-tide elevations within the territorial sea, however measured. Moreover, the provision was thought to embody long-standing principles of international law.[55]

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[52] Report on the Regime of the Territorial Sea 22, [1952] 2 Y. B. Int'l L. Comm'n 33, U. N. Doc. A/CN.4/53 (1952).

[53] Second Report on the Regime of the Territorial Sea 30, [1953] 2 Y. B. Int'l L. Comm'n 57, U. N. Doc. A/CN.4/61 (1953); Addendum to the Second Report on the Regime of the Territorial Sea 5–6, [1953] 2 Y. B. Int'l L. Comm'n 75, U. N. Doc. A/CN.4/61/Add. 1 (1953); Third Report on the Regime of the Territorial Sea 13, [1954] 2 Y. B. Int'l L. Comm'n 5, U. N. Doc. A/CN.4/77 (1954).

[54] Report of the International Law Commission Covering the Work of its Sixth Session, [1954] 2 Y. B. Int'l L. Comm'n 156, U. N. Doc. A/CN.4/88 (1954).

[55] The Commentary to the 1954 Commission draft stated:

"Drying rocks and shoals situated wholly or partly in the territorial sea are treated in the same way as islands. The limit of the territorial sea will accordingly make allowances for the presence of such drying rocks and will jut out to sea off the coast. Drying rocks and shoals, however, which are situated outside the territorial sea have no territorial sea of their own.

"The Commission considers that the above article expresses the international law in force." *Ibid.*

The meaning of the initial 1952 proposal to the Commission

"was that, even if an elevation of the sea bed was only uncovered at low tide, provided it was situated within the territorial sea, the

The draft encountered a serious objection, however, which led to its further amendment by the International Law Commission. If every low-tide elevation "within

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limits of the territorial sea would thereby be extended further out into the high seas. That point of view corresponded with the observation by the Preparatory Committee of The Hague Conference . . . ." [1952] 1 Y. B. Int'l L. Comm'n 175.

The 1930 Conference at The Hague had adopted a similar article:

> "Elevations of the sea-bed *situated within the territorial sea*, though only above water at low tide, are taken into consideration for the determination of the base-line of the territorial sea." (Emphasis supplied.) Acts of the Conference for the Codification of International Law, *supra*, n. 29, at 217 (1930).

The observations of the subcommittee reporting to The Hague Conference further reveal the long-standing acceptance of this concept:

> "If an elevation of the sea-bed which is only uncovered at low tide is situated within the territorial sea off the mainland, or off an island, it is to be taken into consideration on the analogy of the North Sea Fisheries Convention of 1882 in determining the base-line of the territorial sea." *Ibid.*

The United States argues that the discussion of this issue in connection with the *Fisheries Case* (*United Kingdom* v. *Norway*), [1951] I. C. J. 116, indicates an understanding that a low-tide elevation must be within a certain distance from land in order to have a territorial sea of its own. The opinion of the International Court of Justice discussed the contentions of the parties but found it unnecessary to decide the question because "in fact none of the drying rocks used by [Norway] as base points is more than 4 miles from permanently dry land." *Id.*, at 128. The United States relies on the following statement by the United Kingdom of its position:

> "A bank or rock exposed only at low tide (low-tide elevation) is significant in regard to territorial waters only if it lies within a belt of territorial sea measured from the low-water mark of land permanently exposed . . . ." 1 Fisheries Case, I. C. J. Pleadings 75 (1951).

This statement, however, does not exclude low-tide elevations which fall within the territorial sea by virtue of closing lines across bays; and other United Kingdom submissions to the International Court of Justice more accurately reveal its position on this question:

> "[W]here there is a low-tide elevation situated within 4 sea miles of permanently dry land, *or of the proper closing line of Norwegian*

the territorial sea" was to have a territorial sea of its own, then

> "a country like Holland might extend its territorial sea very considerably by advancing from one shoal to another, claiming that a shoal situated within the territorial sea of another shoal had itself a territorial sea." [56]

To avoid this undue extension of the territorial sea, the final draft of the Commission was revised to read as follows:

> "Drying rock and drying shoals which are wholly or partly within the territorial sea, *as measured from the mainland or an island,* may be taken as points of departure for measuring the extension of the territorial sea." [57] (Emphasis supplied.)

It is clear that under the International Law Commission version of Article 11, the "territorial sea, as measured from the mainland" included those portions which extended from baselines enclosing bays.[58] The sole pur-

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internal waters, the outer limit of territorial waters may be 4 sea miles from the outer edge (at low tide) of this low-tide elevation." [1951] I. C. J., at 120. (Emphasis supplied.)

And see the position of the United Kingdom before the International Law Commission, n. 58, *infra.*

[56] [1954] 1 Y. B. Int'l L. Comm'n 95.

[57] Report of the International Law Commission Covering the Work of its Eighth Session, [1956] 2 Y. B. Int'l L. Comm'n 270, U. N. Doc. A/CN.4/104 (1956).

[58] The United States argues that its construction of Article 11 is supported by the failure of the International Law Commission to adopt a proposal of the United Kingdom to insert after the words "territorial sea" the phrase "as measured from the low-water mark or from a baseline." Report of the International Law Comission Covering the Work of its Seventh Session, [1955] 2 Y. B. Int'l L. Comm'n 58, U. N. Doc. A/CN.4/94 (1955). The preference of the Commission for the phrase "as measured from the mainland" to the British terminology, however, is consistent with the view that the phrases were thought to have the same meaning.

pose of the amendment to the initial proposals was to indicate that "drying rocks and drying shoals could only be used once as points of departure for extending the territorial sea and that the process could not be repeated by leapfrogging, as it were, from one rock or shoal to another." [59]

The United States contends that by changing the language of the International Law Commission draft to its present form in the Convention, the Geneva Conference intended also to change its meaning. Precisely the opposite conclusion, however, flows from an inspection of the history of the Convention. The amendment was advanced by the United States; yet its explanation for the proposal contained not the slightest indication that any change in the basic meaning of the Article was intended.[60] Surely there would have been some discussion of the reference to the territorial sea as a measure of distance rather than as a situs had it been the purpose of the United States or the Conference to alter so significantly the meaning of prior drafts and the existing international consensus.[61] Instead, the expert to the

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[59] [1956] 1 Y. B. Int'l L. Comm'n 283.

[60] See United Nations Conference on the Law of the Sea, *supra*, n. 42, at 187, 243.

[61] The United States argues that the meaning of its proposal must have been clear to all, since only three days earlier it had submitted a proposed amendment to another article, introducing the word "mainland" for the express purpose of excluding water crossings from its scope. See *id.*, at 236. But at the time of the United States proposal the word "mainland" *already* appeared in the Conference draft of Article 11 in a context which made clear that measurement of the territorial sea from bay-closing lines was not excluded. Moreover, if the United States had in fact intended its amendment to Article 11 to exclude water crossings, it seems likely that the United States would have spelled out that intention as it had done with respect to the proposal to amend the other article three days before.

Secretariat of the Conference explained "that all the proposals on article 11 corresponded entirely to the intentions of the International Law Commission." [62] We therefore conclude that low-tide elevations situated in the territorial sea as measured from bay-closing lines are part of the coastline from which the three-mile grant of the Submerged Lands Act extends.[63]

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[62] United Nations Conference on the Law of the Sea, *supra*, n. 42, at 186–187. The expert was Mr. Francois, who had been the Special Rapporteur of the International Law Commission for the drafting of the Convention.

[63] This conclusion coincides with the views of authorities who have dealt with the subject. Thus, Sir Gerald Fitzmaurice, who was a member of the International Law Commission and the deputy-leader of the United Kingdom's delegation to the 1958 Geneva Conference, gives this explanation of Article 11:

> "The Convention (Article 11, paragraph 1) permits one exception which has come to be recognised as reasonable, namely, that where a low-tide elevation is situated within what is *already* territorial sea (off a mainland coast, or off the coast of an island permanently above sea level), it can then generate some (as it were) extraterritorial sea. In such a case, the low-tide elevation theoretically has its own territorial sea; but, as the elevation is within what is already the territorial sea of the mainland, or of an island, the practical effect is simply to cause a bulge in the seaward direction of *that* territorial sea. On the other hand, if there is a further drying rock, situated—not within the original or basic territorial sea of the mainland or island—but within the extension of such territorial sea (bulge) caused by the presence of the 'inner' drying rock, then this 'outer' drying rock will not lead to any further extensions of the territorial sea; nor does an 'outer' drying rock, so situated, generate any territorial sea of its own. This rule is intended to prevent the practice known as 'leap-frogging,' which, by making use of a series of drying rocks, banks, etc., extending seawards, might result in artificial or unjustified extensions of natural territorial waters." Fitzmaurice, Some Results of the Geneva Conference on the Law of the Sea, 8 Int'l & Comp. L. Q. 73, 86–87 (1959).

And see McDougal & Burke, *supra*, n. 26, at 396; 1 Shalowitz, *supra*, n. 7, at 228.

3. *The semicircle test.* Article 7 (2) defines a bay as follows:

> "For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation."

(a) In several areas along the Louisiana coast the parties raise the problem of whether and to what extent indentations within or tributary to another indentation can be included in the area of the latter for purposes of the semicircle test. Louisiana argues that a closing line should be drawn across what it calls "Outer Vermilion Bay" from Tigre Point to Shell Keys. That body of water does not meet the semicircle test unless the area of Vermilion Bay, joined to "Outer Vermilion Bay" only by a channel between the mainland and Marsh Island, is included. Similarly, Louisiana contends that "Ascension Bay," whose headlands are said to be the jetties at Belle Pass on the west and Southwest Pass on the east, is a bay under Article 7 (2).[64] Again, however,

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[64] The United States argues—in addition to its contention that it does not meet the semicircle test—that "Ascension Bay" is not a true bay because it is a "mere curvature of the coast" rather than a "well-marked indentation" containing "landlocked waters." If this contention is accepted, then it is of course irrelevant that "Ascension Bay" meets the semicircle test. See *infra,* at 54. Whether an indentation qualifies as a bay under the criteria of Article 7 other than the semicircle test is a factual question which should be submitted to the Special Master in the first instance.

If "Ascension Bay" does qualify under Article 7, on the other hand, it is an oversize bay, for the closing line across its mouth its area will satisfy the semicircle test only if deemed to include the waters of the Barataria Bay-Caminada

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exceeds 24 miles. See n. 68, *infra*. The procedure to be followed in such event is spelled out in Article 7 (5):

"Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length."

The straight 24-mile line selected by Louisiana runs from Caminada Pass to Empire Canal, just east of Bastian Bay, and we can see no valid objection to that line. The United States argues that Article 7 (5) permits the drawing inside an oversize bay of only one 24-mile closing line (or perhaps several lines totaling 24 miles). Yet Louisiana has, in addition to drawing the 24-mile line from Caminada Pass to Empire Canal, also drawn closing lines across other indentations within "Ascension Bay," such as West Bay, which qualify independently as inland waters. The United States' position is that the tributary bays cannot be taken into account in computing the area of the larger indentation for purposes of the semicircle test but then disregarded in measuring the parts of the bay to be enclosed by the 24-mile line. We find nothing in the Convention or its history to support this contention. Article 7 (5) mandates that a straight 24-mile baseline shall be drawn within an oversize bay so as to include the greatest area of water. It does not follow from the fact that this *additional* method of delimiting inland waters in an oversize bay is available, that smaller bays within the oversize bay but outside the straight 24-mile baseline lose their status as inland waters.

If it is determined that "Ascension Bay" does not qualify as a "well-marked indentation" containing "landlocked waters," and that a straight baseline therefore cannot be drawn within it from Caminada Pass to Empire Canal, the question will be presented whether the beach erosion jetties on Grande Isle are part of the coast within Article 8 of the Convention. See *supra*, at 36. We hold that they are. The United States argues that Article 8 is limited to structures which are "integral parts of the harbor system" and that there is no harbor between Grande Isle and the jetties. While some early discussion of the subject by the International Law Commission tends to support the United States' position that

Bay complex, which are separated from the outer indentation by a string of islands.[65]

Louisiana argues that the area of tributary bays or other indentations must be included within that of the primary indentation. Article 7 (3) provides that "[f]or the purpose of measurement, the area of an indentation is that lying between *the low-water mark around the shore* of the indentation and a line joining the low-water marks of its natural entrance points." (Emphasis supplied.) The italicized phrase, it is said, constitutes a direction to follow the low-water line wherever it goes, including into other indentations, in drawing the perimeter of the primary bay. The general rule is well recognized, Louisiana argues, by the United States

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these jetties are not encompassed by Article 8, see [1954] 1 Y. B. Int'l L. Comm'n 88, the Commentary to the final International Law Commission draft of Article 8 (which was identical to its present form) expressly covers artificial structures which are not closely linked to ports:

> "(2) Permanent structures erected on the coast and jutting out to sea (such as jetties and *coast protective works*) *are assimilated to harbour works*." [1956] 2 Y. B. Int'l L. Comm'n 270. (Emphasis supplied.)

Moreover, it should be noted that the beach erosion jetties are in a real sense "harbour works," for they were designed to protect Grande Isle, which in turn shelters the harbor waters of Caminada Bay and Bay des Ilettes.

[65] The problem may also arise in West Bay, where the parties disagree as to the proper closing line. In particular, the United States objects to Louisiana's choice of the tip of the jetty at Southwest Pass as the southern headland. If that point is selected, the United States argues, the bay cannot satisfy the semicircle test unless areas such as Bob Taylor's Pond, Zinzin Bay, or Riverside Bay are included in its area; and those areas are "too definitely separated from West Bay to be considered a part of it." The proper location of headlands is, of course, another factual determination which we leave to the initial scrutiny of the Master.

Department of State among others, that the area of bays within bays is included in calculating the semicircle test.[66]

The United States does not reject the notion that some indentations which would qualify independently as bays may nonetheless be considered as part of larger indentations for purposes of the semicircle test; but it denies the existence of any rule that *all* tributary waters are so includible. Article 7 (2), it emphasizes, refers to "that indentation." The inner bays can be included, therefore, only if they can reasonably be considered part of the single, outer indentation. And that cannot be said of inland waters which, like Vermilion Bay and Barataria Bay-Caminada Bay, are wholly separated from the outer body of water and linked only by narrow passages or channels.[67]

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[66] "[T]he water of bays within bays may be included as water surface of the outer bay in determining the dimensions of any coastal indentation." Sovereignty of the Sea, United States State Department Geographic Bulletin No. 3, p. 11 (1965). See also 1 Shalowitz, *supra,* n. 7, at 219: "In the application of the semicircular rule to an indentation containing pockets, coves, or tributary waterways, the area of the whole indentation (including pockets, coves, etc.) is compared with the area of a semicircle."

[67] 1 Shalowitz, *supra,* n. 7, at 220, n. 28, contains the following suggestions:

"One difficulty that arises in including tributary waterways as part of the area of the indentation whose status is to be determined, is that the status may depend upon how far up the tributary one goes in computing the area. This may require the adoption of an additional rule limiting the width of such waterways to a fixed amount beyond which it would not be considered a part of the primary waterway. An alternative solution would be to first apply the semicircle test to the tributary waterways: if they become inland waters a closing line is drawn across them and the primary waterway is then subjected to the test; if they do not become inland waters they would then be included as part of the area of the main

For purposes of this lawsuit, we find it unnecessary to provide a complete answer to the questions posed by the parties. "Outer Vermilion Bay," if it is to qualify under the semicircle test, must include the waters of Vermilion Bay. Yet Vermilion Bay is itself a part of the much larger indentation which includes West and East Cote Blanche Bays and Atchafalaya Bay, and which opens to the sea between Marsh Island and Point au Fer. Recognition of the unitary nature of this larger indentation follows from Louisiana's insistence that the low-water mark must be followed around the entire indentation. If, as Louisiana posits, the western headland of the indentation is at Tigre Point, then a closing line across its mouth to Point au Fer far exceeds the 24-mile limit imposed by Article 7 (4).[68] It follows that "Outer Vermilion Bay" is neither itself a bay nor part of a larger bay under the Convention on the Territorial Sea and the Contiguous Zone.

We have concluded, on the other hand, that the area of "Ascension Bay" does include the Barataria Bay-Caminada Bay complex and therefore meets the semicircle test. Those inner bays are separated from the larger "Ascension Bay" only by the string of islands across their entrances.[69] If those islands are ignored, the entrance to Barataria and Caminada Bays is sufficiently

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indentation for the purpose of determining its status by the semicircular rule."

See also Shalowitz, Boundary Problems Raised by the Submerged Lands Act, 54 Col. L. Rev. 1021, 1033, n. 33 (1954). And see Bouchez, *supra*, n. 23, at 21, emphasizing the need to distinguish between bays and inland seas.

[68] Article 7 (4) reads as follows:

"If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters."

[69] See n. 79, *infra*.

wide that those bays and "Ascension Bay" can reasonably be deemed a single large indentation even under the United States' approach.[70] Article 7 (3) provides that for the purposes of calculating the semicircle test, "[i]slands within an indentation shall be included as if they were part of the water areas of the indentation." The clear purpose of the Convention is not to permit islands to defeat the semicircle test by consuming areas of the indentation. We think it consistent with that purpose that islands should not be permitted to defeat the semicircle test by sealing off one part of the indentation from the rest. Treating the string of islands "as if they were part of the water areas" of the single large indentation within which they lie, "Ascension Bay" does meet the semicircle test.[71]

(b) Another issue involving the semicircle test arises in East Bay in the Mississippi River Delta.[72] Since East Bay does not meet the semicircle test on a closing line between its seawardmost headlands—the tip of the jetty at Southwest Pass and the southern end of South Pass—it does not qualify as a bay under Article 7 of the Convention on the Territorial Sea and the Contiguous Zone. There is a line which can be drawn within East

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[70] The United States does not agree with Shalowitz' alternative suggestion that in determining the area of a large indentation, the areas of all qualifying bays within it should be excluded. See *supra*, at 51 and n. 67.

[71] We think the same result follows in West Bay, where the areas which the United States seeks to exclude from the bay are set off only by strings of islands. See n. 65, *supra*. Accordingly, should the closing line urged by Louisiana be accepted, it will not be defeated by the semicircle test.

[72] Louisiana contends that the entire area of East Bay is a historic bay. See *infra*, at 74. If that position is accepted, of course, none of the geographic tests of Article 7 will be applicable, for Article 7 provides that "[t]he foregoing provisions shall not apply to so-called 'historic' bays . . . ."

Bay, however, so as to satisfy the semicircle test. Louisiana argues that, just as under Article 7 (5) a 24-mile line can be drawn within a bay whose mouth is more than 24 miles wide,[73] so also can a line which satisfies the semicircle test be drawn within a bay whose mouth is too wide to meet that test.

The analogy is unsound. A bay whose mouth is wider than 24 miles is nevertheless a bay. But an indentation that does not meet the semicircle test is not a bay but open sea. If an indentation which satisfies the semicircle test is a true bay, therefore, it cannot be on the theory that the closing line carves out a portion of a larger bay. The enclosed indentation must by its own features qualify as a bay.

The United States argues that the area within East Bay enclosed by Louisiana's proposed line does not constitute a bay because there is no "well-marked indentation" with identifiable headlands which encloses "landlocked" waters. Indeed, it is said, there is not the slightest curvature of the coast at either asserted entrance point. We do not now decide whether the designated portion of East Bay meets these criteria, but hold only that they must be met. We cannot accept Louisiana's argument that an indentation which satisfies the semicircle test *ipso facto* qualifies as a bay under the Convention. Such a construction would fly in the face of Article 7 (2), which plainly treats the semicircle test as a minimum requirement. And we have found nothing in the history of the Convention which would support so awkward a construction.

4. *Islands at the mouth of a bay.* Article 7 (3) of the Convention on the Territorial Sea and the Contiguous Zone provides:

> "For the purpose of measurement, the area of an indentation is that lying between the low-water

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[73] See n. 64, *supra*.

> mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semicircle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation."

While the only stated relevance of such islands is to the semicircle test, it is clear that the lines across the various mouths are to be the baselines for all purposes.[74] The application of this provision to the string of islands across the openings to the Lake Pelto-Terrebonne Bay-Timbalier Bay complex has raised the following questions: (a) between what points on the islands are the closing lines to be drawn, and (b) should the lines be drawn landward of a direct line between the entrance points on the mainland?

(a) It is Louisiana's primary contention that when islands appear in the mouth of a bay, the lines closing the bay and separating inland from territorial waters should be drawn between the mainland headlands and the *seawardmost* points on the islands. This position, however, is refuted by the language of Article 7 (3), which provides for the drawing of baselines "across the different *mouths*" (emphasis supplied), not across the most seaward tips of the islands. There is no suggestion in the Convention that a mouth caused by islands is to be located in a manner any different from a mouth between points on the mainland—that is, by "a line joining the low-water marks of [the bay's] natural entrance points." The "natural entrance points" may, and in some instances in the Lake Pelto-Terrebonne Bay-Timbalier Bay complex do, coincide with the outermost edges of the islands. But there is no automatic correlation, and the headlands must be selected according to the same principles that govern the location of entrance points on the mainland.

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[74] The 24-mile limitation, for instance, is applied to the aggregate lengths of the closing lines. See 1 Shalowitz, *supra*, n. 7, at 221. See also the following Commentary of the International Law Commission:

"If, as a result of the presence of islands, an indentation whose features as a 'bay' have to be established has more than one mouth, the total length of the lines drawn across all the different mouths will be regarded as the width of the bay." [1956] 2 Y. B. Int'l L. Comm'n 269.

(b) Louisiana argues in the alternative that even if the closing lines should not necessarily connect the most seaward points on the islands, in no event should they be drawn landward of a direct line between the entrance points on the mainland.[75] The purpose of Article 7 (3) is expressed in the following passage from the Commentary of the International Law Commission:

> "Here, the Commission's intention was to indicate that the presence of islands at the mouth of an indentation tends to link it more closely to the mainland, and this consideration may justify some alteration in the ratio between the width and the penetration of the indentation." [76]

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[75] The extent to which this problem is presented by this case depends upon the exact location of the line between the entrance points on the mainland. The United States and Louisiana disagree as to the location of the headlands on the mainland, the United States having selected points considerably inland of those chosen by Louisiana. Since even the straight line between the mainland headlands urged by the United States is not entirely landward of what it considers the mouths between the islands, we do not postpone consideration of Louisiana's contention to a determination of the natural entrance points on the mainland.

[76] [1956] 2 Y. B. Int'l L. Comm'n 269.

It is evident, Louisiana argues, that Article 7 (3) was designed to enlarge rather than contract the area of inland waters; and that this policy would not be served by permitting islands intersected by a direct closing line between the mainland headlands to pull that line inward, particularly when the indentation would qualify as a bay even in the absence of the islands.[77] Rather, the line should be selected which will enclose the maximum area of inland waters.[78]

Louisiana's argument is undermined, however, by the natural effect of islands at the mouth of an indentation described in the International Law Commission Commentary. Just as the "presence of islands at the mouth of an indentation tends to link it more closely to the mainland," so also do the islands tend to separate the waters within from those without the entrances to the bay. Even waters which would be considered within the bay and therefore "landlocked" in the absence of the islands are physically excluded from the indentation if they lie seaward of the mouths between the islands. It would be anomalous indeed to say that waters are part of a bay even though they lie outside its natural entrance points. No doubt there could be islands which would not, whether because of their size, shape, or relationship to the mainland, be said to create more than one mouth to the bay. But where, as in the Lake Pelto-Terrebonne Bay-Timbalier Bay complex, a string of islands covers a large percentage of the distance between the mainland entrance points, the openings between the islands are distinct mouths outside of which the waters cannot sensibly be called "inland."

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[77] The direct, mainland-to-mainland line proposed by Louisiana across the Lake Pelto-Terrebonne Bay-Timbalier Bay indentation would meet the 24-mile test, but it appears that the line drawn by the United States would not. The exact length of the United States line need not be determined, however, because we hold that, for the purpose of the question at issue, there is no distinction between indentations which would qualify as bays without the presence of islands and those which would not. See next paragraph. Nothing in the language or the history of Article 7 (3) limits its application to those indentations which would not be bays except for the presence of islands. If the islands intersected by a direct line between the mainland headlands actually create multiple mouths, the selection of closing lines across those mouths is not optional.

[78] Shalowitz agrees that the purpose of Article 7 (3) supports a policy in favor of enclosing the maximum area of inland water. See 1 Shalowitz, *supra,* n. 7, at 225, n. 38. However, the context of his remarks is quite different from the present one. He there suggests that a policy in favor of enclosing the greatest area would support drawing lines out to islands wholly seaward of a direct line between the entrance points on the mainland, but not drawing lines inward to islands wholly within such a direct closing line. Elsewhere Shalowitz appears to agree that if lines are drawn to and between the islands, they should be across the natural entrance points, even if those natural entrance points are landward of a straight mainland-to-mainland line. See *id.,* at 221, fig. 40. See also Pearcy, Measurement of the U. S. Territorial Sea, 40 Dept. State Bull. 963, 966, fig. 4 (1959).

Louisiana purports to find support for its position in the provision of Article 7 (3) that "[i]slands within an indentation shall be included as if they were part of the water areas of the indentation." This provision would preclude drawing lines to an island wholly within the indentation,[79] Louisiana argues, and it should therefore also preclude drawing closing lines to any part of an island landward of a straight line between the mainland headlands. We cannot, however, accept this construction of the Convention. An island which is intersected by a direct mainland-to-mainland closing line is not "within [the] indentation." Nor can an island which forms the mouth of an indentation be "within" it.

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[79] Since this issue is not presented by the insular configurations at the Lake Pelto-Terrebonne Bay-Timbalier Bay complex, we express no opinion on it. However, we note that the issue may arise in relation to the Caminada Bay-Barataria Bay indentation. Despite our holding that "Ascension Bay," of which Caminada and Barataria Bays are a part, does satisfy the semicircle test, *supra*, at 52–53, it will be open to the United States to argue before the Master that "Ascension Bay" does not otherwise qualify as a bay under Article 7 (2) of the Convention on the Territorial Sea and the Contiguous Zone. A holding that "Ascension Bay" is not a true bay would preclude the drawing of a straight 24-mile baseline from

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Caminada Pass to Empire Canal, see n. 64, *supra*, and would call into question the proper closing lines across the Caminada Bay-Barataria Bay indentation. In its reply brief, Louisiana for the first time contested the United States' proposal to draw baselines along the low-water marks on the fringe of islands across that indentation. Louisiana asserts that a straight closing line can be drawn between the appropriate entrances on the mainland which is entirely seaward of all the islands on which the United States has drawn baselines.

Although the question whether lines should be drawn inward to islands which are not intersected by a direct mainland-to-mainland closing line is one of construction of the Convention rather than of fact, for several reasons we have decided to leave its resolution to the Special Master in the first instance. The issue may not arise at all, if it is determined either that "Ascension Bay" is a true bay or that a direct line between the proper mainland headlands does intersect the islands. Moreover, the issue is a close one, yet one on which we have not had the benefit of concerted advocacy on both sides. On the one hand, the considerations which led us to reject Louisiana's contention with respect to islands intersected by a straight mainland-to-mainland closing line appear to militate in favor of drawing lines inward to islands which seemingly create distinct mouths to the indentation. This view is supported by the fact that Article 7 (3) contains no requirement that the islands be intersected by a mainland-to-mainland closing line; rather it speaks only of multiple mouths "because of the presence of islands." On the other hand, Article 7 (3) does provide that islands wholly "within" the indentation shall be treated as part of the water areas. Because the issue is a difficult one of first impression and few illuminating materials have been brought to our attention, we feel that our resolution of the question, if necessary, would be greatly aided by its prior submission to a neutral referee.

Article 7 (3) clearly distinguishes between islands which, by creating multiple mouths, form a part of the perimeter of the bay, and those which, by their presence wholly "within" the bay, are treated as part of its water areas.

In sum, we hold that where islands intersected by a direct closing line between the mainland headlands create multiple mouths to a bay, the bay should be closed by lines between the natural entrance points on the islands, even if those points are landward of the direct line between the mainland entrance points.

5. *Islands as headlands of bays.* With respect to many of the bays on the Louisiana coast the question is presented whether a headland of an indentation can be located on an island.[80] The United States argues

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[80] The question arises with respect to low-tide elevations as well as islands. We think that in this context there can be no distinction between them. Article 7 (4) provides that the bay-closing line shall be drawn "between *the low-water marks* of the natural entrance points." (Emphasis supplied.) The line is to be drawn at low-tide, and, therefore, if a natural entrance point can be on an area of land surrounded by water, it can be on a low-tide elevation as well as an island.

The United States observes that under Article 4, see n. 89, *infra,* straight baselines "shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them." *A fortiori,* the United States argues, bay-closing lines cannot be drawn to such low-tide elevations. The argument overlooks the different policy considerations underlying Articles 4 and 7. Straight baselines can be drawn to islands under Article 4 only if they enclose areas "sufficiently closely linked to the land domain to be subject to the regime of internal waters." Low-tide elevations obviously do not so closely tie the enclosed waters to the land; and if they could be used for straight baselines, "the distance between the baselines and the coast might be extended more than is required to fulfil the purpose for which the straight baseline method is applied." International Law Commission Commentary on its final draft, [1956] 2 Y. B. Int'l L. Comm'n 268. A further reason given by the International Law that the Convention on the Territorial Sea and the Contiguous Zone flatly prohibits the drawing of bay-closing lines to islands. A true bay, it is said, is an "indentation" within the mainland, and it cannot be created by the "projection" of an island or islands from the coast. Moreover, the rule of Article 7 (3) that the area of an indentation lies between the closing line and "the low-water mark around the shore of the indentation" contemplates a perimeter of dry land unbroken by any opening other than the bay's entrance. Finally, the United States argues, such an opening between the island and the mainland would deprive the enclosed waters of the "landlocked" quality required in a true bay.

We do not agree that the face of the Convention clearly concludes the question. No language in Article 7 or elsewhere positively excludes all islands from the meaning of the "natural entrance points" to a bay. Waters within an indentation which are "landlocked" despite the bay's wide entrance surely would not lose that characteristic on account of an additional narrow opening to the sea. That the area of a bay is delimited by the "low-water mark around the shore" does not necessarily mean that the low-water mark must be continuous.[81]

Moreover, there is nothing in the history of the Convention or of the international law of bays which estab-

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Commission for the prohibition against drawing straight baselines to low-tide elevations is that "it would not be possible at high tide to sight the points of departure of the baselines." *Ibid.* The need to identify headlands on the coast at high tide is not so great as it is in respect of basepoints in the sea, and for that reason the Convention measures bay-closing lines from the low-water mark.

[81] Compare the position of the United States that the low-water perimeter of indentations should be broken by water-crossing lines closing off distinct smaller indentations within the larger bay, *supra*, at 51.

lishes that a piece of land which is technically an island can never be the headland of a bay. Of course, the general understanding has been—and under the Convention certainly remains—that bays are indentations in the *mainland*,[82] and that islands off the shore are not headlands but at the most create multiple mouths to the bay.[83] In most instances and on most coasts it is no doubt true that islands would play only that restricted role in the delimitation of bays. But much of the Louisiana coast does not fit the usual mold. It is marshy, insubstantial, riddled with canals and other waterways, and in places consists of numerous small clumps of land which are entirely surrounded by water and therefore technically islands. With respect to some spots along the Louisiana coast even the United States has receded from its rigid position and recognized that these insular configurations are really "part of the mainland." The western shore of the Lake Pelto-Terrebonne Bay-Timbalier Bay indentation is such a formation, and is treated by the United States as part of the coast.

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[82] Most of the references by 19th and early 20th century authorities to the connection between islands and bays foreshadowed the modern concept—embodied in Article 7 (3) of the Convention—of islands creating multiple mouths to bays and tying the waters of the indentation more closely to the mainland. See, *e. g.*, Calvo, excerpted in Crocker, *supra*, n. 29, at 29; Piédelièvre, Précis de Droit International Public ou Droit des Gens (1894), in Crocker, at 389; Testa, Le Droit Public International Maritime (1886), in Crocker, at 448. Some authors, relying principally on an 1839 Franco-English convention regulating fisheries in the English Channel, stated that bay-closing lines should be drawn between the "extreme points of the mainland and sand banks." Latour, excerpted in Crocker, *supra*, n. 29, at 257. See also Perels, *id.*, at 357–358. In view of the contrast drawn between "mainland" and "sand banks," it may be that this formulation contemplated the drawing of closing lines to pieces of land closely related to the mainland but entirely surrounded by water, as sand banks often are.

[83] The United States argues that since the Convention in Article 7 (3) specifically recognizes that islands may create multiple *mouths* to bays, it cannot be construed to permit islands to create the *bays* themselves. Alternatively, the Government argues that if a closing line can be drawn from one side of a bay to an island as the headland on the other side, then it must be continued from the island to the nearest point on the mainland; and the distance to the mainland must be added to that across the bay in determining whether the 24-mile test is satisfied. These arguments, however, misconstrue the theory by which the headland is permitted to be located on the island—that the island is so closely aligned with the mainland as realistically to be considered an integral part of it. Thus viewed, there is no "mouth" between the island and the mainland.

This Court too has in the past adopted this realistic approach to similar land formations. In *Louisiana* v. *Mississippi*, 202 U. S. 1, 45–46, we wrote:

> "Mississippi denies that the peninsula of St. Bernard and the Louisiana Marshes constitute a peninsula in the true sense of the word, but insists that they constitute an archipelago of islands. Certainly there are in the body of the Louisiana Marshes or St. Bernard peninsula portions of sea marsh which might technically be called islands, because they are land entirely surrounded by water, but they are not true islands. They are rather, as the Commissioner of the General Land Office wrote the Mississippi land commissioner in 1904, 'in fact, hummocks of land surrounded by the marsh and swamp in said townships. . . .'
>
> "And when the Louisiana act used the words: 'thence bounded by the said Gulf to the place of beginning, including all islands within three leagues of the coast,' the coast referred to is the whole coast of the State, and the peninsula of St. Bernard formed an integral part of it."

Naturally this common-sense approach extends to coastal formations where there are only a few islands, or even a single island, as well as to those where there are many. Such has been the view of other courts[84]

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[84] In the case of *The "Anna,"* 165 Eng. Rep. 809 (1805), the British High Court of Admiralty was called upon to determine a claim that an American ship seized by a privateer off the Mississippi River Delta had been wrongfully taken in American territorial waters. In holding for the claimant, the court wrote:

"The capture was made, it seems, at the mouth of the River Mississippi, and, as it is contended in the claim, within the boundaries of the United States. We all know that the rule of law on this subject is *'terrae dominium finitur, ubi finitur armorum vis,'* and since the introduction of fire-arms, that distance has usually been recognised to be about three miles from the shore. But it so happens in this case, that a question arises as to what is to be deemed the shore, since there are a number of little mud islands composed of earth and trees drifted down by the river, which form a kind of portico to the mainland. It is contended that these are not to be considered as any part of the territory of America, that they are a sort of *'no man's land,'* not of consistency enough to support the purposes of life, uninhabited, and resorted to, only, for shooting and taking birds' nests. It is argued that the line of territory is to be taken only from the Balise, which is a fort raised on made land by the former Spanish possessors. I am of a different opinion; I think that the protection of territory is to be reckoned from these islands; and that they are the natural appendages of the coast on which they border, and from which indeed they are formed. Their elements are derived immediately from the territory, and on the principle of alluvium and increment, on which so much is to be found in the books of law. . . ." *Id.*, at 814–815.

The United States argues that the decision is not in point because it had nothing to do with the delimitation of bays and merely held, as Article 10 of the Convention now provides, see n. 94, *infra*, that the three-mile belt is to be measured from islands in the same way as from the mainland. But if the court had been of the view that the three-mile belt extended from islands as well as the mainland, it would not have had to decide that the mud islands were "deemed the shore." And the opinion in *The "Anna"* gave rise to several categorical statements by 19th century authorities that "[t]he term 'coasts' includes the natural appendages of the territory which rise and of textwriters.[85] Much of the Louisiana coast on or near the Mississippi River Delta is of the same general consistency as the western shore of the Lake Pelto-

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out of the water, although these islands are not of sufficient firmness to be inhabited or fortified . . . .” H. Wheaton, Elements of International Law 256 (8th ed. 1866). See also Halleck, International Law (4th ed. 1908), in Crocker, *supra,* n. 29, at 88–90. And it is ancient lore that islands created by sedimentation at river entrances are peculiarly integrated with the mainland itself:

“The islands situated at the mouth of a river are embraced as part of the territory, even when they are not occupied. They are considered as forming the beginning of the government of the country, because the elements of which they are composed have become detached from the soil itself. It is from their coast that the littoral sea commences.” Nys, Le Droit International (1904), in Crocker, at 321.

Our discussion of these authorities should not be taken as suggesting that, under the now controlling Convention on the Territorial Sea and the Contiguous Zone, every Mississippi River Delta mudlump or other insular formation is a part of the coast. We do believe, however, that the origin of the islands and their resultant connection with the shore is one consideration relevant to the determination of whether they are so closely tied to the mainland as realistically to be considered a part of it.

[85] “Obviously, some islands must be treated as if they were part of the mainland. The size of the island, however, cannot in itself serve as a criterion, as it must be considered in relationship to its shape, orientation and distance from the mainland.” Boggs, Delimitation of Seaward Areas under National Jurisdiction, 45 Am. J. Int’l L. 240, 258 (1951).

“Islands close to the shore may create some unique problems. They may be near, separated from the mainland by so little water that for all practical purposes the coast of the island is identified as that of the mainland.” Pearcy, Geographical Aspects of the Law of the Sea, 49 Annals of Assn. of American Geographers No. 1, p. 1, at 9 (1959).

The Director of the Coast and Geodetic Survey, Department of Commerce, has stated the following rule for the assimilation of islands to the mainland:

“The coast line should not depart from the mainland to embrace offshore islands, except where such islands either form a portico

Terrebonne Bay-Timbalier Bay complex, and some of the islands may be so closely linked to the mainland as realistically to be assimilated to it. While there is little objective guidance on this question to be found in international law, the question whether a particular island is to be treated as part of the mainland would depend on such factors as its size, its distance from the mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast.[86] We leave to the Special Master the task of determining in the first instance—in the light of these and any other relevant criteria and any evidence he finds it helpful to consider—whether the islands which Louisiana has designated as headlands of bays are so integrally related to the mainland that they are realistically parts of the "coast" within the meaning of the Convention on the Territorial Sea and the Contiguous Zone.

6. *Fringes of islands.* At several places [87] the question is raised whether areas between the mainland and fringes

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to the mainland and are so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters, *or they form an integral part of a land form.*" Memorandum of April 18, 1961, excerpted in 1 Shalowitz, *supra*, n. 7, at 161, n. 125. (Emphasis supplied.)

Shalowitz has recognized that "[w]ith regard to determining which islands are part of a land form and which are not, no precise standard is possible. Each case must be individually considered within the framework of the principal rule." *Id.*, at 162. And see Strohl, *supra*, n. 23, at 76, fig. 18.

[86] This enumeration is intended to be illustrative rather than exhaustive.

[87] One such place is Caillou Bay, the body of water between the mainland and the westernmost of the string of islands known as the Isles Dernières. Another is the large area consisting of Chandeleur Sound and Breton Sound between the northeastern shores of the Mississippi River Delta and the Chandeleur Islands chain. This latter area is not in dispute, for the United States, while asserting that the sounds are not necessarily inland waters under the

or chains of islands along the coast are inland waters. The parties agree that no article of the Convention specifically provides that such areas are inland waters. Louisiana argues that they are inland waters, under any one of several theories: that such island fringes form the perimeter of bays under Article 7, that straight baselines must be drawn along the islands under Article 4, or that the waters should be deemed "inland" under general principles of international law which antedate and supplement the Convention on the Territorial Sea and the Contiguous Zone. The position of the United States is that such island chains can be taken into account as enclosing inland waters only by drawing straight baselines; yet the decision whether to draw such baselines is within the sole discretion of the Federal Government, and the United States has not chosen to do so.

We have concluded that Article 7 does not encompass bays formed in part by islands which cannot realistically be considered part of the mainland.[88] Article 7 defines bays as indentations in the "coast," a term which is used in contrast with "islands" throughout the Convention. Moreover, it is apparent from the face and the history of the Convention that such insular formations were intended to be governed solely by the provision in

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Convention, has conceded that they belong to Louisiana. That concession was made at an early stage of this litigation, see n. 97, *infra*, and the United States has decided not to withdraw it despite the subsequent ratification of the Convention. Louisiana further contends that some of the Chandeleur Islands form part of the perimeter of a bay—which it calls "Isle au Breton Bay"—enclosing inland waters between their southern edges and the North and Main Passes of the Mississippi River Delta. The United States objects to this use of the island fringe.

[88] Louisiana does not contend that any of the islands in question is so closely aligned with the mainland as to be deemed a part of it, and we agree that none of the islands would fit that description.

Article 4 for straight baselines.[89] The language of Article 4 itself is the clearest indication of that intent:

> "1. In localities where the coast line is deeply indented and cut into, *or if there is a fringe of islands along the coast in its immediate vicinity,* the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured." (Emphasis supplied.)

The drafters of the Convention and their predecessors were aware that international law permitted such island fringes in some circumstances to enclose inland waters.[90]

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[89] "1. In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

"2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters.

"3. Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them.

"4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.

"5. The system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another State.

"6. The coastal State must clearly indicate straight baselines on charts, to which due publicity must be given."

[90] Although international accord on the concept of straight baselines along island chains is a fairly recent development, there are some earlier statements of the principle. See, *e. g.*, Raestad, La Mer

The principle was recognized and applied by the International Court of Justice in the *Fisheries Case* (*United Kingdom* v. *Norway*), [1951] I. C. J. 116, in which Norway was held legitimately to have drawn straight baselines along the "skjaergaard," literally a "rock rampart" composed of hundreds of thousands of insular formations which ringed the mainland. Thereafter, with the *Fisheries Case* as the model, attempts were made to draft concrete rules for the uniform treatment of such island fringes, and both the International Law Commission and the 1958 Geneva Conference discussed the problem at length.[91] There was, however, too little technical information or consensus among nations on that and related subjects to allow the formulation of uniform rules.[92] It was agreed, therefore, that the problem should be handled as it had been by the International

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Territoriale (1913), excerpted in Crocker, *supra*, n. 29, at 407. See generally McDougal & Burke, *supra*, n. 26, at 314–316.

[91] See the discussion of the International Law Commission at [1954] 1 Y. B. Int'l L. Comm'n 66; [1955] 1 Y. B. Int'l L. Comm'n 197, 218, 252; [1955] 2 Y. B. Int'l L. Comm'n 37; [1956] 1 Y. B. Int'l L. Comm'n 185, 194–195; and of the 1958 Geneva Conference in United Nations Conference on the Law of the Sea, *supra*, n. 42, at 43–44, 60, 141, 156, 162–163. A thorough review of the practice of nations and international studies of the problem is found at 4 M. Whiteman, Digest of International Law 274–303.

[92] The 1930 Hague Convention, for example, was unable to recommend a specific provision:

"With regard to a group of islands (archipelago) and islands situated along the coast, the majority of the Sub-Committee was of opinion that a distance of ten miles should be adopted as a basis for measuring the territorial sea outward in the direction of the high sea. Owing to the lack of technical details, however, the idea of drafting a definite text on this subject had to be abandoned." Acts of the Conference for the Codification of International Law, *supra*, n. 29, at 219.

See also Fitzmaurice, *supra*, n. 63, at 88–90; McDougal & Burke, *supra*, n. 26, at 377–386.

Court of Justice in the *Fisheries Case:* each nation was left free to draw straight baselines along suitable insular configurations if it so desired.[93] In the light of this reso-

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[93] The history of the subject is summarized in the Reference Guide to the Articles Concerning the Law of the Sea Adopted by the International Law Commission at its Eighth Session, U. N. Doc. A/C.6/L.378, p. 45, n. 1 (1956), as follows:

"In his first report . . . the special rapporteur proposed an article entitled 'Groups of Islands.' This was article 10, which read as follows:

" 'With regard to a group of islands (archipelago) and islands situated along the coast, the ten-mile line shall be adopted as the base line for measuring the territorial sea in the direction of the high sea. The waters included within the group shall constitute inland waters.'

"He explained, however, that he had inserted this text 'not as expressing the law at present in force, but as a basis of discussion should the Commission wish to study a text envisaging the progressive development of international law on this subject.' He referred to a passage in the Judgment of the International Court of Justice in the Fisheries case where the Court had said . . . :

" 'In this connection, the practice of States does not justify the formulation of any general rule of law. The attempts that have been made to subject groups of islands or coastal archipelagoes to conditions analogous to the limitations concerning bays (distance between the islands not exceeding twice the breadth of the territorial waters, or ten or twelve sea miles), have not got beyond the stage of proposals.'

"In his second report . . . the special rapporteur suggested as article 10 an abbreviated version of his earlier proposal, which now simply read as follows:

" 'With regard to a group of islands (archipelago) and islands situated along the coast, the ten mile line shall be adopted as the base line.'

"After consulting the Committee of Experts the special rapporteur put forward a more elaborate proposal . . . and yet a further proposal in his third report . . . .

"The latter proposal read as follows:

" '1. The term "group of islands," in the juridical sense, shall be deemed to mean three or more islands enclosing a portion of the lution of the problem, it is clear that the drafters did not intend to leave island fringes beyond the scope of the Convention altogether. The deliberate decision was that such island formations are not to be treated differently from any other islands[94] unless the coastal nation decides to draw straight baselines.[95]

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sea when joined by straight lines not exceeding five miles in length, except that one such line may extend to a maximum of ten miles.

"'2. The straight lines specified in the preceding paragraph shall be the base lines for measuring the territorial sea; waters lying within the area bounded by such base lines and the islands themselves shall be considered as inland waters.

"'3. A group of islands may likewise be formed by a string of islands taken together with a portion of the mainland coastline. The rules set forth in paragraphs 1 and 2 of this article shall apply *pari passu.*'

"The Commission, however, after postponing the question in 1954, *decided in 1955 that article 5, which dealt with 'Straight baselines,' might be applicable to groups of islands situated off the coasts, while the general rules would normally apply to other islands forming a group.* This position was confirmed in 1956, the Commission adding that it was prevented from stating an opinion on this subject not only by disagreement on the breadth of the territorial sea but also by lack of technical information. The Commission hoped, however, that if an international conference were subsequently to study the proposed rules, it would give attention to this problem which the Commission recognized to be an important one." (Emphasis supplied.)

While the 1958 Geneva Conference gave the problem its attention, it was prevented by the same reasons from formulating an article dealing with groups and fringes of islands other than Article 4.

[94] Islands are normally covered by Article 10:

"1. An island is a naturally-formed area of land, surrounded by water, which is above water at high-tide.

"2. The territorial sea of an island is measured in accordance with the provisions of these articles."

[95] This conclusion is shared by Shalowitz. See 1 Shalowitz, *supra*, n. 7, at 227 and n. 44. Strohl posits that "a fringe of islands can make up one side of a bay," Strohl, *supra*, n. 23, at 72, but recognizes that the only provision of the Convention which would

In *United States* v. *California,* 381 U. S. 139, 168, we held that "the choice under the Convention to use the straight-base-line method for determining inland waters claimed against other nations is one that rests with the Federal Government, and not with the individual States."[96] Since the United States asserts that it has not drawn and does not want to draw straight baselines along the Louisiana coast, that disclaimer would, under the *California* decision, be conclusive of the matter. Louisiana argues, however, that because the Louisiana coast is so perfectly suited to the straight baseline method, and because it is clear that the United States would employ it in the conduct of its international affairs were it not for this lawsuit, the Court should reconsider its holding in *California* and itself draw appropriate baselines. While we agree that the straight baseline method was designed for precisely such coasts as the Mississippi River Delta area, we adhere to the position that the selection of this optional method of establishing bound-

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authorize such a baseline is Article 4. *Id.,* at 60. This conclusion is not undermined by occasional references to an insular formation as creating a "bay." See, *e. g.,* [1955] 1 Y. B. Int'l L. Comm'n 211, Bouchez, *supra,* n. 23, at 233 (both referring to Long Island Sound); *Manchester* v. *Massachusetts,* 139 U. S. 240 (referring to Buzzard's Bay). Only one authority appears to assume, without discussion, that a bay formed by islands would be governed by the provisions of Article 7. Pearcy, *supra,* n. 78, at 965. (The area in question was that between the coast of Florida and the chain of Keys curving to the south and east. The United States points out that they are linked by a permanent highway and therefore may be considered as part of the mainland.)

[96] In the same vein, we held that the choice whether to employ the concept of a "fictitious bay" was that of the Federal Government alone. 381 U. S., at 172. That holding was, of course, consistent with the conclusion that the drawing of straight baselines is left to the Federal Government, for a "fictitious bay" is merely the configuration which results from drawing straight baselines from the mainland to a string of islands along the coast. See 381 U. S., at 170, n. 38.

aries should be left to the branches of Government responsible for the formulation and implementation of foreign policy. It would be inappropriate for this Court to review or overturn the considered decision of the United States, albeit partially motivated by a domestic concern, not to extend its borders to the furthest extent consonant with international law.[97]

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[97] Louisiana further contends that the United States is estopped from denying the "inland water" status of such areas by its concession in earlier stages of this litigation that the areas between the mainland and all the offshore islands were inland waters. We took note of this concession in *United States* v. *Louisiana,* 363 U. S. 1, 67, n. 108:

"The Government concedes that all the islands which are within three leagues of Louisiana's shore and therefore belong to it under the terms of its Act of Admission, happen to be so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters. Thus, Louisiana is entitled to the lands beneath those waters quite apart from the affirmative grant of the Submerged Lands Act, under the rule of *Pollard's Lessee* v. *Hagan,* 3 How. 212. Furthermore, since the islands enclose inland waters, a line drawn around those islands and the intervening waters would constitute the 'coast' of Louisiana within the definition of the Submerged Lands Act. Since that Act confirms to all States rights in submerged lands three miles from their coasts, the Government concedes that Louisiana would be entitled not only to the inland waters enclosed by the islands, but to an additional three miles beyond those islands as well. *We do not intend, however, in passing on these motions, to settle the location of the coastline of Louisiana or that of any other State.*" (Emphasis supplied.)

As we stressed in that case, this Court has placed no imprimatur on that position. Nor do we think the United States is bound by it. Louisiana has not relied to its detriment on the concession, which appears to have been made primarily for purposes of reaching agreement on the leasing of the submerged lands pending a final ruling on their ownership. The Interim Agreement of 1956 specifically recognized that neither party would be bound by its positions:

"The submerged lands in the Gulf of Mexico are divided for the purposes hereof into four zones as shown on the plat annexed hereto as Exhibit 'A,' which reflects as a base line the so-called 'Chapman-Line.' No inference or conclusion of fact or law from

7. *Historic inland waters.* Louisiana argues that all the waters of the Mississippi River Delta, and East Bay in particular, are "so-called 'historic' bays" within the meaning of Article 7 (6),[98] and that they are therefore inland waters notwithstanding their failure to meet the geographical requirements of Article 7 and the United States' refusal to draw straight baselines.[99] Historic

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the said use of the so-called 'Chapman-Line' or any other boundary of said zones is to be drawn to the benefit or prejudice of any party hereto . . . ."

Moreover, we note that the concession did not include as inland waters the area Louisiana designates as "Isle au Breton Bay." See n. 87, *supra*.

It might be argued that the United States' concession reflected its firm and continuing international policy to enclose inland waters within island fringes. It is not contended at this time, however, that the United States has taken that posture in its international relations to such an extent that it could be said to have, in effect, utilized the straight baseline approach sanctioned by Article 4 of the Convention. If that had been the consistent official international stance of the Government, it arguably could not abandon that stance solely to gain advantage in a lawsuit to the detriment of Louisiana. Cf. *United States* v. *California*, 381 U. S. 139, 168: "[A] contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable." We do not intend to preclude Louisiana from arguing before the Special Master that, until this stage of the lawsuit, the United States had actually drawn its international boundaries in accordance with the principles and methods embodied in Article 4 of the Convention on the Territorial Sea and the Contiguous Zone.

[98] See n. 72, *supra*.

[99] Louisiana also suggests that the indentations between the passes of the Mississippi River Delta are part of the river mouth and therefore inland waters under Article 13 of the Convention:

"If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-tide line of its banks."

The Article obviously does not encompass indentations between arms of land formed by the river but not containing it.

bays are not defined in the Convention, and the term therefore derives its content from general principles of international law.[100] As the absence of a definition indicates, there is no universal accord on the exact meaning of historic waters.[101] There is substantial agreement, however, on the outlines of the doctrine and on the type of showing which a coastal nation must make in order to establish a claim to historic inland waters.[102] But because the concept of historic waters is still relatively imprecise and its application to particular areas raises primarily factual questions, we leave to the Special Master—as we did in *United States* v. *California*—the task of determining in the first instance whether any of the waters off the Louisiana coast are historic bays. We do not think the ultimate resolution of this litigation would be hastened by any further discussion of the subject at this time, beyond the remarks below.

In its effort to establish that the waters of the Delta have been subjected to the continuous authority of the coastal nation, Louisiana has relied heavily on its own activities as well as on those of the Federal Government. The United States contends that those state activities cannot in this lawsuit support the position that the Delta waters are historic bays. The argument is not that such exercises of authority by Louisiana would not be relevant to a claim of historic title *vis-à-vis* another nation. On the contrary, the United States has "[n]o doubt [that] the national government may, if it chooses, rely on State action to support its own historic claim as against other nations." [103] But, the United States asserts, "a State cannot oblige it to do so or to accept State action as binding in a domestic case such as the present one." In brief, then, the United States' position is that it can prevent judicial recognition of a ripened claim to historic title merely by lodging a disclaimer with the court.

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[100] The United States argues that the Convention recognizes only historic *bays* and not other kinds of inland water bodies. We do not pass on this contention except to note that, by the terms of the Convention, historic bays need not conform to the normal geographic tests and therefore need not be true bays. How unlike a true bay a body of water can be and still qualify as a historic bay we need not decide, for all of the areas of the Mississippi River Delta which Louisiana claims to be historic inland waters are indentations sufficiently resembling bays that they would clearly qualify under Article 7 (6) if historic title can be proved.

[101] See *supra*, at 24.

[102] See n. 27, *supra*.

In *United States* v. *California* we noted, but found it unnecessary to pass on, the United States' contention that historic title cannot be founded upon exercises of state authority because a claim to historic inland waters can be maintained only if endorsed by the United States. We there sustained the Master's determination that, even assuming the relevance of California's assertions of sovereignty over the coastal waters, they did not establish historic title. The United States' disclaimer was credited only because the case presented such "questionable evidence of continuous and exclusive assertions of dominion." 381 U. S., at 175. And we noted that we were "reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was clear beyond doubt." *Ibid.* Thus, the Court indicated its unwillingness to give the United States the same complete discretion to block a claim of historic inland waters as it possesses to decline to draw straight baselines.

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[103] In this the United States appears to be correct. While the unauthorized activities of private citizens could generally not support a claim of historic title, see Juridical Regime of Historic Waters, Including Historic Bays, *supra*, n. 27, at 14–15; Bouchez, *supra*, n. 23, at 238; Strohl, *supra*, n. 23, at 303–304, the actions of local governments, if not repudiated by or inimical to the interests of the national sovereign, are assertions of dominion as against other nations. And claims to historic title have been based in part on such actions. See the opinion of the Court of Commissioners of Alabama Claims in *Stetson* v. *The United States*, quoted in 4 J. Moore, International Arbitrations 4332, 4339 (1898); Opinion of Attorney General Randolph on the seizure of the ship "Grange" in Delaware Bay, 1 Op. Atty. Gen. 32 (1793). See generally McDougal & Burke, *supra*, n. 26, at 360–361.

While we do not now decide that Louisiana's evidence of historic waters is "clear beyond doubt," neither are we in a position to say that it is so "questionable" that the United States' disclaimer is conclusive. We do decide, however, that the Special Master should consider state exercises of dominion as relevant to the existence of historic title. The Convention was, of course, designed with an eye to affairs between nations rather than domestic disputes. But, as we suggested in *United States* v. *California,* it would be inequitable in adapting the principles of international law to the resolution of a domestic controversy, to permit the National Government to distort those principles, in the name of its power over foreign relations and external affairs, by denying any effect to past events.[104] The only fair way to apply the Convention's recognition of historic bays to this case, then, is to treat the claim of historic waters as if it were being made by the national sovereign and opposed by another nation. To the extent the United

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[104] It is one thing to say that the United States should not be required to take the novel, affirmative step of adding to its territory by drawing straight baselines. It would be quite another to allow the United States to prevent recognition of a historic title which may already have ripened because of *past* events but which is called into question for the first time in a domestic lawsuit. The latter, we believe, would approach an impermissible contraction of territory against which we cautioned in *United States* v. *California.* See n. 97, *supra.*

States could rely on state activities in advancing such a claim, they are relevant to the determination of the issue in this case.

III.

In due course a Special Master will be appointed by the Court to make a preliminary determination, consistent with this opinion, of the precise boundaries of the submerged lands owned by Louisiana in the Gulf of Mexico.

It is so ordered.

[Map of Louisiana coast follows this page.]

THE CHIEF JUSTICE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

We must decide in this case the meaning of the term "inland waters," as used in the Submerged Lands Act of 1953.[1] Although the value of all the submerged lands probably could be stated only in astronomical figures, this dispute is a minor one involving only a comparatively small segment of land adjacent to Louisiana.[2] The Court chooses as the proper meaning the com-

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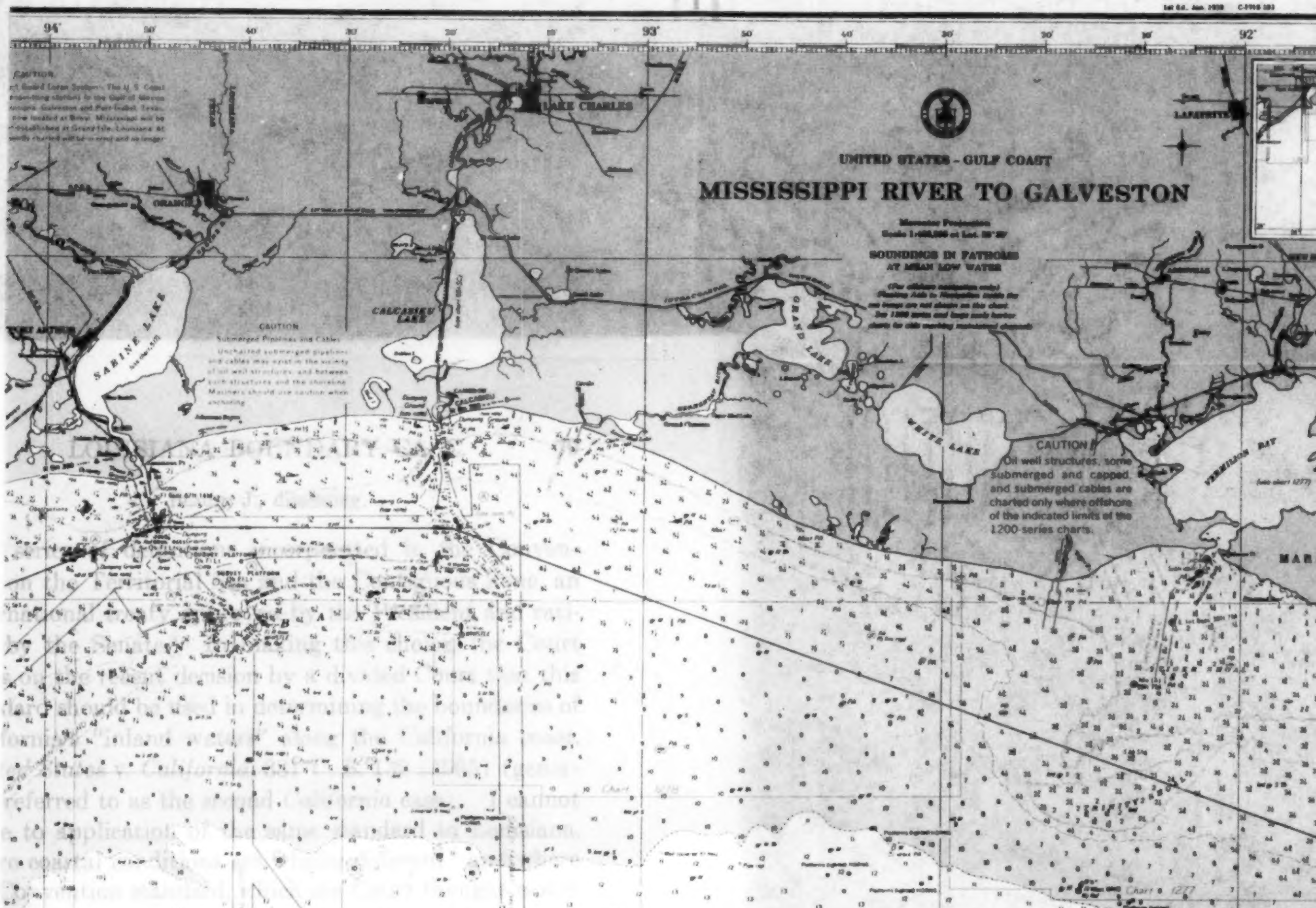
[1] 67 Stat. 29, 43 U. S. C. §§ 1301-1315.

[2] For this reason it is difficult to understand why the Federal Government is subjecting the State of Louisiana and this Court to a long series of technical and wasteful lawsuits. When all of them are over the United States will have little more undersea land than it already had. The only practical difference that I can see at the moment if the Federal Government wins is that it, instead of the State, will have power to lease the land to some oil company. On the other hand should Louisiana win, it can lease the land perhaps at a bigger price and then, as I pointed out in a prior separate opinion, *United States* v. *Louisiana,* 363 U. S. 1, 85, 98-100, devote its oil income to public education.

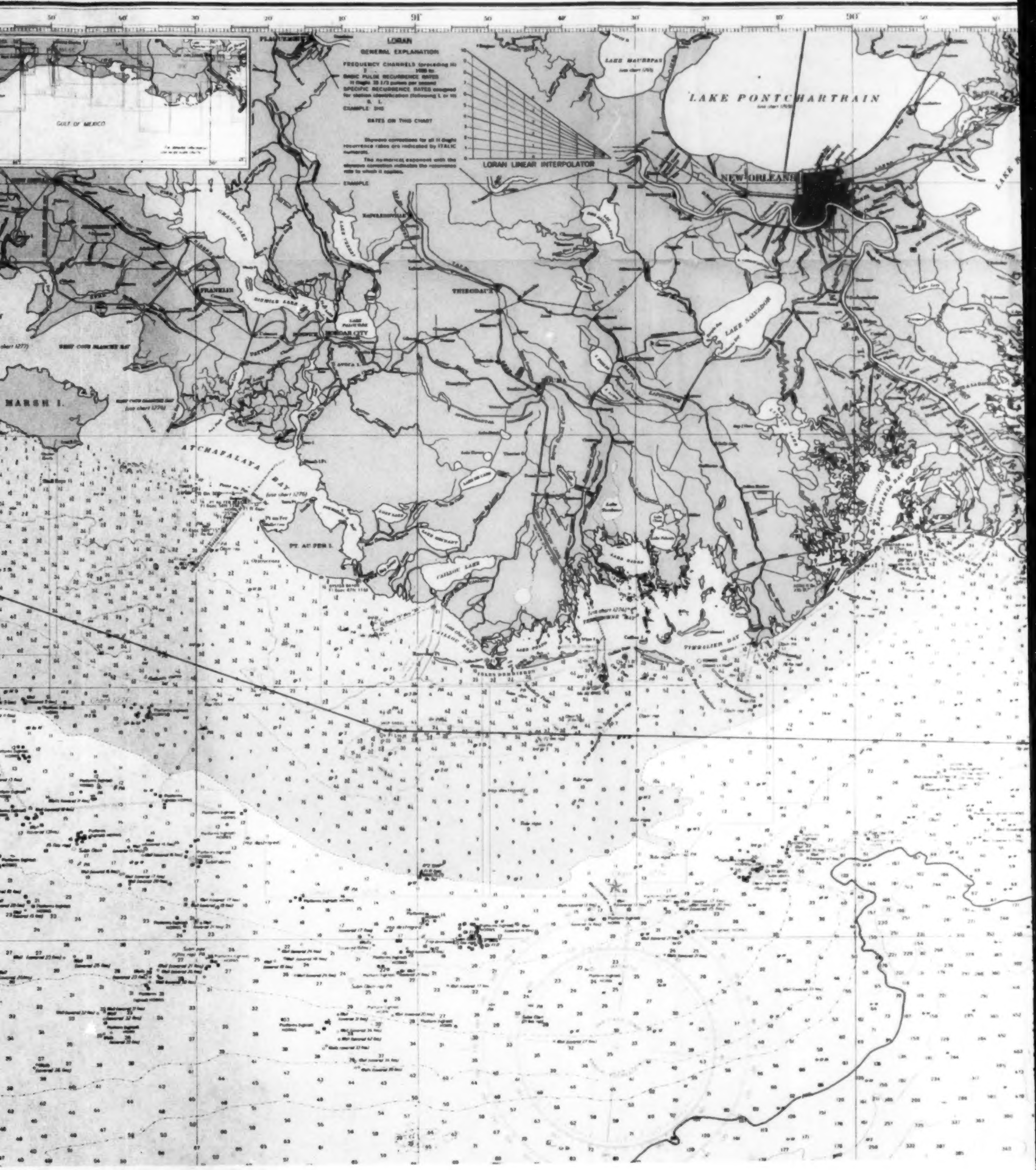


UNITED STATES - GULF COAST
MISSISSIPPI RIVER TO GALVESTON
SOUNDINGS IN FATHOMS AT MEAN LOW WATER
LAKE CHARLES
LAFAYETTE
ORANGE
SABINE LAKE
CALCASIEU LAKE
GRAND LAKE
WHITE LAKE
VERMILION BAY
CAUTION
Submerged Pipelines and Cables
Uncharted submerged pipelines and cables may exist in the vicinity of all well structures and between such structures and the shoreline. Mariners should use caution when anchoring.
CAUTION
Oil well structures, some submerged and capped, and submerged cables are charted only where offshore of the indicated limits of the 1200-series charts.
94°
93°
92°

Louisiana Coastline (U.S.C. & G.S. Chart 1115 & 1116)

————Louisiana Coastline, Act 33 of 1954 (Inland Water Line)

—— 100 ——Outer edge of Continental Shelf

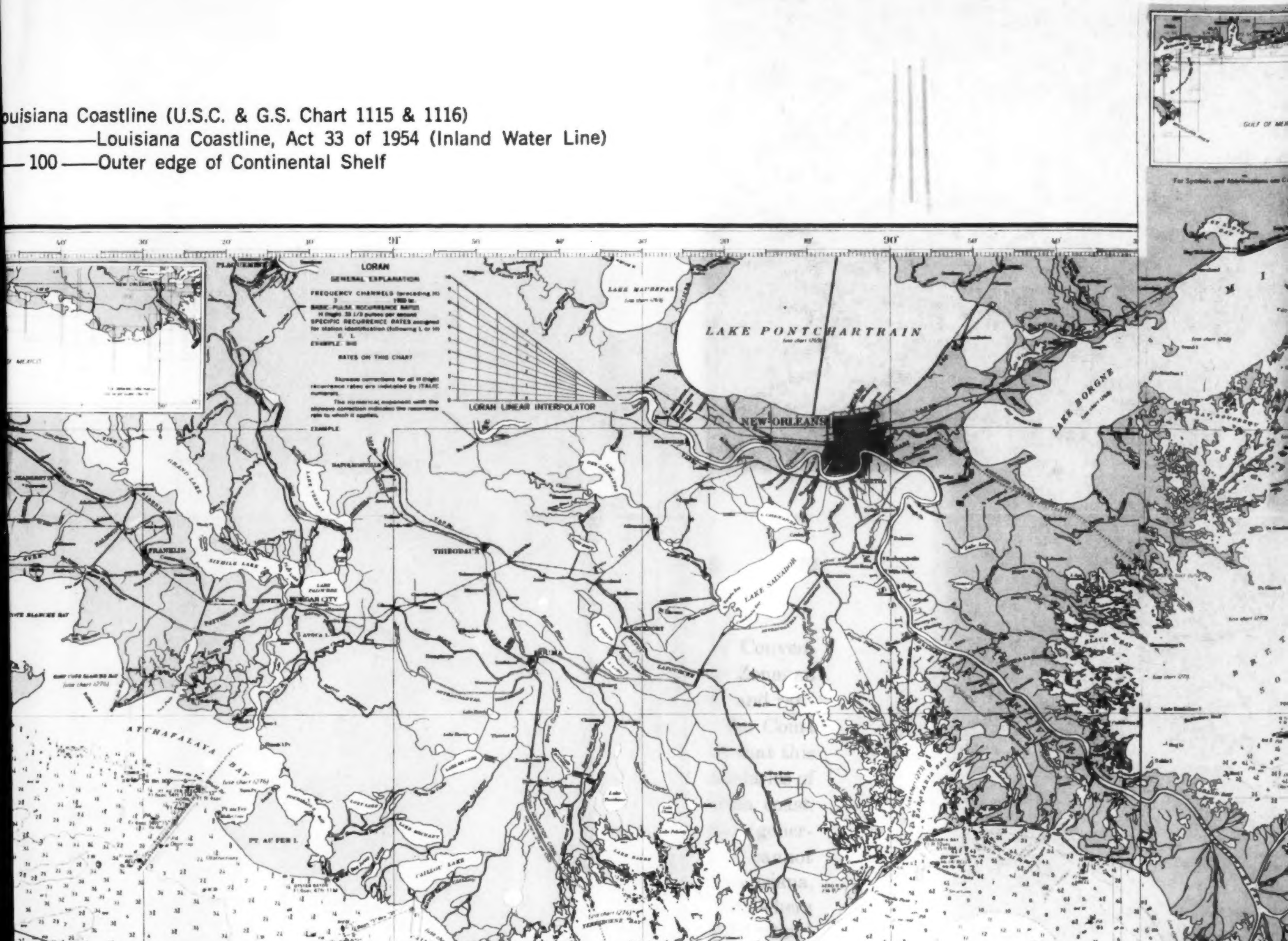


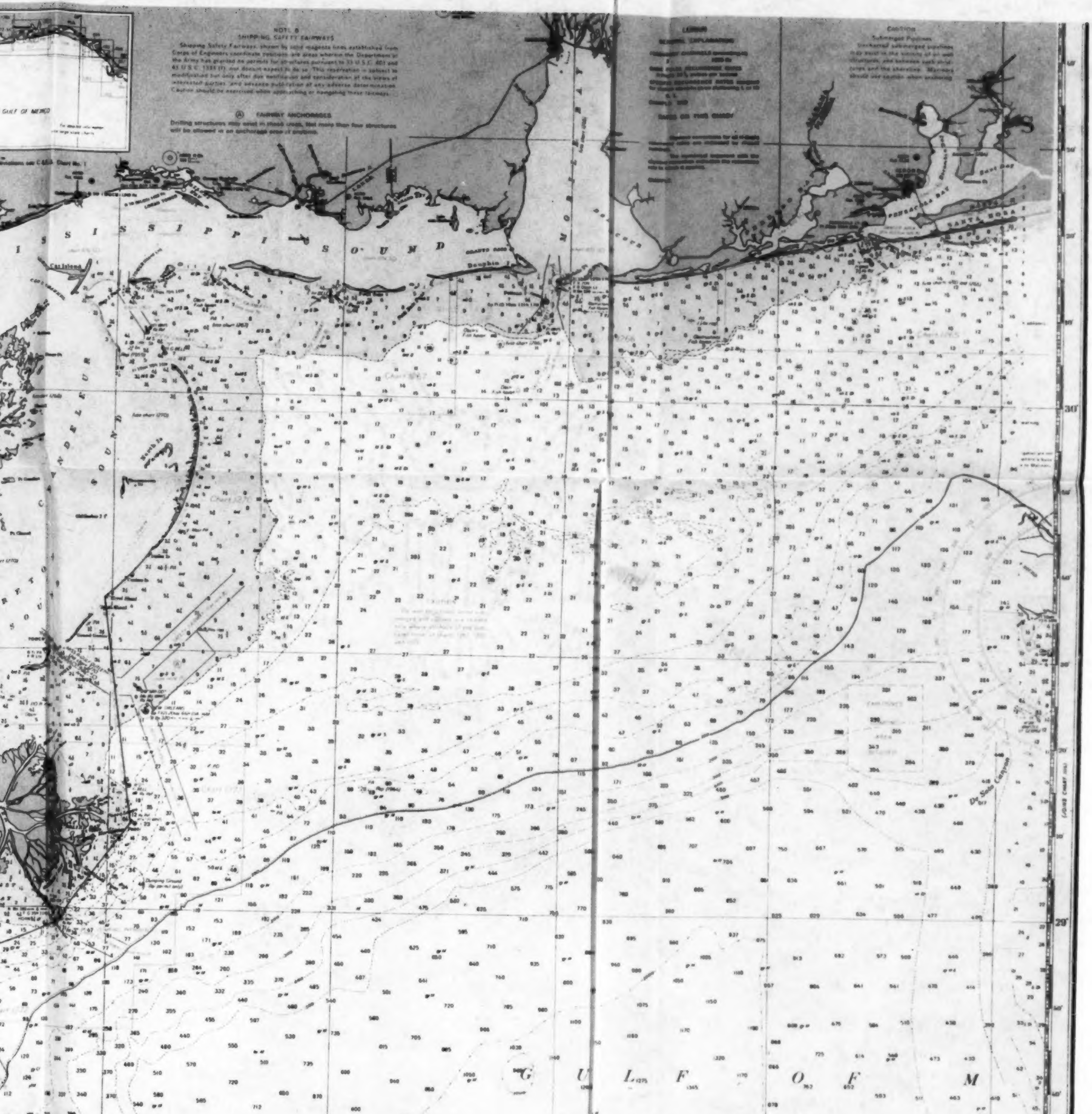
91°
90°
LORAN
GENERAL EXPLANATION
LORAN LINEAR INTERPOLATOR
GULF OF MEXICO
LAKE MAUREPAS
LAKE PONTCHARTRAIN
NEW ORLEANS
THIBODAUX
FRANKLIN
GRAND LAKE
LAKE SALVADOR
MARSH I.
ATCHAFALAYA BAY
CAILLOU LAKE
TERREBONNE BAY

ouisiana Coastline (U.S.C. & G.S. Chart 1115 & 1116)

———Louisiana Coastline, Act 33 of 1954 (Inland Water Line)

— 100 ——Outer edge of Continental Shelf


LORAN
GENERAL EXPLANATION
RATES ON THIS CHART
LORAN LINEAR INTERPOLATOR
91°
90°
LAKE MAUREPAS
LAKE PONTCHARTRAIN
NEW ORLEANS
LAKE BORGNE
THIBODAUX
FRANKLIN
MORGAN CITY
HOUMA
LAKE SALVADOR
ATCHAFALAYA BAY
PT AU FER I
TERREBONNE BAY
TIMBALIER BAY
BARATARIA BAY
GULF OF ME



NOTE B
SHIPPING SAFETY FAIRWAYS

Shipping Safety Fairways, shown by solid magenta lines established from Corps of Engineers coordinate positions, are areas wherein the Department of the Army has granted no permits for structures pursuant to 33 U.S.C. 403 and 43 U.S.C. 1333 (f), nor does it expect to do so. This reservation is subject to modification but only after due notification and consideration of the views of interested parties, and advance publication of any adverse determination. Caution should be exercised when approaching or navigating these fairways.

Ⓐ FAIRWAY ANCHORAGES

Drilling structures may exist in these areas. Not more than four structures will be allowed in an anchorage area at anytime.

CAUTION
Submerged Pipelines

Uncharted submerged pipelines may exist in the vicinity of oil well structures, and between such structures and the shoreline. Mariners should use caution when anchoring.

plex series of definitions incorporated in the Convention on the Territorial Sea and the Contiguous Zone, an international treaty approved by the President and ratified by the Senate.[3] In making this choice, the Court relies on the recent decision by a divided Court that this standard should be used in determining the boundaries of California's "inland waters" along the California coast. *United States* v. *California,* 381 U. S. 139 (1965) (generally referred to as the second *California* case). I cannot agree to application of the same standard to Louisiana, where coastal conditions are wholly different[4] and where the Convention standard, which the Court thought would provide some certainty and stability for California, can only cause chaos and confusion. Nor can I find any justification for applying the Convention standard applied in the second *California* case to Louisiana, a State that was not a party to the West Coast litigation but urges us to adopt a different standard, one especially convenient for application to Louisiana's own unusual coast, and one never even considered in the West Coast litigation.[5] Under these circumstances I must dissent.

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[3] 44 Dept. State Bull. 609; [1964] 15 U. S. T. (pt. 2) 1607, T. I. A. S. No. 5639.

[4] "History is subject to geology. Every day the sea encroaches somewhere upon the land, or the land upon the sea; cities disappear under the water, and sunken cathedrals ring their melancholy bells. Mountains rise and fall in the rhythm of emergence and erosion; rivers swell and flood, or dry up, or change their course; valleys become deserts, and isthmuses become straits. To the geologic eye all the surface of the earth is a fluid form, and man moves upon it as insecurely as Peter walking on the waves to Christ."

W. & A. Durant, The Lessons of History 14–15 (1968).

[5] The propriety of using the Coast Guard line as the seaward line of inland waters was not litigated in the second *California* case. The issue was not raised by the pleadings; nor was it argued. The point was raised once on oral argument when MR. JUSTICE BRENNAN asked if the United States relied on the Coast Guard line. Mr. Cox,

I would hold that "inland waters" should be measured in Louisiana, and in any other State with similar coastal characteristics, by the standard urged by Louisiana—the Coast Guard line established years ago, under the authority of an 1895 Act of Congress, to mark off the boundaries of the States' "inland waters." Such a holding would put an end to a useless, unnecessary litigation, over an issue that can well be characterized as *de minimis* so far as the practical effect to the United States is concerned.

I.

In 1947 this Court decided that no one of the States bordering on the Atlantic or Pacific Ocean or on the Gulf of Mexico owned any part of the land submerged under the waters lying adjacent to its shores.[6] In 1953 Congress, in the Submerged Lands Act, "restored" to the States what it thought our holding had wrongfully taken away from them. What the Act did was in effect to quitclaim to each coastal State submerged land extending three geographic miles seaward from the State's coastline, except that under certain circumstances States bordering on the Gulf of Mexico were entitled to a maximum of not more than three leagues (roughly nine geographic miles) from the coastline. Under the Act submerged land of the Continental Shelf more than three miles or three leagues beyond the coastline is property of the United States. The Act defined "coast line" in § 2 (c) as "the line of ordinary low water along that portion of the coast which is in direct contact with the

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the Solicitor General, replied that the United States placed no reliance on it, the purpose of that line being "to indicate where the inland rules applicable to vessels control and where the international ocean rules control." He added that Louisiana will contend, when her case reaches here, that the Coast Guard line does control but that it was not involved in the California segment of the litigation.

[6] *United States* v. *California*, 332 U. S. 19 (1947).

open sea and the line marking the seaward limit of inland waters." This definition of "coast line" is, of course, not clear enough in itself for one to go out and look around the waters and fix the boundary line between submerged lands belonging to the Federal Government and those belonging to the States, particularly since the crucial term "inland waters" is not defined in the Act at all. There appears to be one thing certain about the problem, however, and that is that the dispute between Louisiana and the United States is no part of international affairs subject to international law, but is exclusively a domestic controversy between the State and Nation. The United States, nevertheless, contends that in determining this purely domestic dispute, the Act's words must be given their content in international law and the controlling principles must be found in the international Convention. The United States places its chief reliance for this contention on the second *California* case. In that case some questions arose about whether certain segments of the California coastline, particularly with reference to bays, inlets, sounds, indentations, and islands, were within California's inland waters. There the Court did not pass on the applicability of the 1895 Act of Congress,[7] and seeking a satisfactory way to

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[7] This is vividly demonstrated by the colloquy between MR. JUSTICE BRENNAN and Solicitor General Cox, referred to in n. 5 above:

"JUSTICE BRENNAN: Now, I have forgotten—maybe the briefs cover this provision of Title 33 under which the Commandant of the Coast Guard is required to fix the lines dividing the high seas from inland waters.

"Do you rely on that at all?

"MR. COX: Oh, no. And neither does California.

"JUSTICE BRENNAN: Well, would you tell me why part (a)(2) of that title dealing with this very section, for example, there is a provision that 'The outer limits of inland waters in Santa Barbara Harbor shall be,' and then there is a description, a line drawn from Santa Barbara, the light-blue one, past the Santa determine some of the perplexing problems about treatment of bays, etc., as inland waters, a divided Court concluded to resort to the treaty mentioned. The majority believed reliance on the treaty was dictated by the need

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Barbara Harbor breakwater which, if I locate it on this map, is some little segment away in the upper corner, beneath the word 'Santa Barbara' on your map. But you don't rely at all on the definition of inland waters on Congressional definition in another statute.

"MR. COX: No. No. We think that those statutes relate simply to—had one purpose and only one purpose, and that is to indicate where the inland rules applicable to vessels control and where the international ocean rules control.

"JUSTICE BRENNAN: Just traffic rules of the road.

"MR. COX: They are just traffic rules of the road, we would say.

"Now, in the Louisiana case, if and when it ever gets here, Louisiana will contend it relies on that because in that instance it happens that the Coast Guard line is placed way out in the Gulf, but here it is apparently placed way in.

"JUSTICE BRENNAN: As I get it, it is only a tiny bit of a corner up there at that point.

"MR. COX: That is right. And, of course, this is terribly deep water and ocean-going vessels use it.

"Now, I should say that there are some small points in these bays that we would agree were harbors. For example, we would agree that up—if you can remember Monterey Bay—that is not on this map—it sort of hooks around, comes around in like this (demonstrating), and the shore comes out this way. We would agree that these little points up here are harbors. If you have been to Monterey, we would agree that the area in which you see fishing vessels anchored, up there at the dock, that is a harbor. That has not been argued about here. We concede. And there may be a few little points up next to Santa Barbara that come the same way as harbors.

"JUSTICE BRENNAN: Well, I notice that the Commandant has defined inland waters from Monterey Harbor, San Luis Obispo, San Pedro, Santa Barbara, Crescent City, Isthmus Cove at Santa Catalina and Avalon Bay, but you don't rely on any of these.

"MR. COX: No. We don't rely on any of them.

"JUSTICE BRENNAN: You don't rely on that.

"MR. COX: We don't rely on it, no." (Emphasis added.)

to adopt "the best and most workable definitions available," 381 U. S., at 165, thus, as it was believed, adding stability to the operation of the Act and carrying out a purpose of the Act's proponents to give security of title to the State and its oil lessees.

But if that turns out to be the result of using the treaty definitions in the second *California* case, it will certainly not be the result here, for there are crucial differences between the two coasts. California waters are in the main deep and often are navigable very close to shore. There are few indentations along that State's coast, and most of these are smooth or relatively regular in shape. The shoreline is, of course, subject to changes by natural forces, but the land along the shore is for the most part hard and rocky, and therefore such changes in the shoreline have been extremely gradual. The Louisiana coast is entirely different in many ways. The waters off the shore are shallow and often not readily navigable. The shoreline is marked by numerous complex indentations, and indeed the United States, in a brief filed earlier in this litigation, itself recognized that "[t]he Louisiana *coast* line is an extraordinarily complicated one."[8] (Emphasis added.) Even more important than this complexity of the present coastline is its highly volatile nature. The mighty Mississippi brings sediment and mud which may build up little islands and mud elevations one day and destroy them the next. Parts of the Mississippi Delta are receding at a rapid rate, while in other parts deposits are rapidly being built up. Recent projects along the Atchafalaya River may cause that river to begin building another massive delta that could grow seaward at a rate of almost one mile per year. Because the coast is composed of soft, silt-like material, because the water is for the most part relatively shallow, and because the elevation of the land along the shore is extraordinarily low, the shoreline often changes drastically merely as a result of temporary variations in winds and waves. Offshore islands sometimes appear or disappear spontaneously as a result of the same forces, and of course major hurricanes to which Louisiana—unlike California—is occasionally exposed, cause even more substantial changes.

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[8] Memorandum for the United States in Reply to Louisiana's Brief in Opposition to Motion for Leave to File Complaint, March 7, 1956, pp. 9–10.

In Louisiana, consequently, the Court cannot correctly say about its holding what it said with some plausibility in the second *California* case:

> "Before today's decision no one could say with assurance where lay the line of inland waters as contemplated by the Act; hence there could have been no tenable reliance on any particular line. After today that situation will have changed. Expectations will be established and reliance placed on the line we define. . . . 'Freezing' the meaning of 'inland waters' in terms of the Convention . . . serves to fulfill the requirements of definiteness and stability which should attend any congressional grant of property rights belonging to the United States." 381 U. S., at 166–167.

Today's holding does not grant Louisiana the "definiteness and stability" promised to California. A company having an oil lease now under ocean waters of Louisiana gets no more than an ambulatory title: here today and gone tomorrow. And with its title, I suppose, will go all of its expensive investment in developing the lease. Stable business cannot be fostered that way. The ambulatory title, which the Court finds in the Submerged Lands Act, I think frustrates the just expectations Congress desired that oil companies have in the stability of their leases for exploitation of oil under the sea.

Nothing was said in the second *California* opinion indicating that the treaty provisions the Court borrowed in that case were to be mechanically used to fit every land dispute. The treaty was chosen there because the Court thought it provided the "best and most workable definitions available" in the dispute between California and the United States; the doctrine cannot fit all cases. If it worked for stability in California, it has a directly opposite effect in Louisiana. Moreover, the doctrine is tending to bring about interminable litigation. Passed 15 years ago, the Act has generated litigation that is not yet abating; we have another dispute similar to this one before us now, and neither the United States nor the State indicates that there is not far more time-consuming litigation still to come. In fact, discussion of this case by the Court requires 63 pages in what appears to me to be as succinct and clear an opinion as could have been written. And even yet the end of the dispute has not arrived. How many years the Master who must now be appointed will have to work, how many persons must be hired to help him, no one can predict. Settling and identifying boundaries on land is a surveyor's job; he must go to the land with his instruments and mark it off. Identifying an ocean boundary, we are told by the briefs and arguments of both parties here, is a much more complex job; it takes much time by surveyors, cartographers, photographers, and oceanographers, a knowledge of angles, tides, rolling waters, higher mathematics, etc.[9] Shorelines are constantly changing, and thus under the Court's formula even this painstaking work cannot provide a means of marking the boundary for all time. I cannot accept the argument that Congress ever intended to impose on this Court such an unjudicial job. I turn therefore to Louisiana's contentions that Congress long ago adopted a plan and selected a government agency to determine where the inland water line is, that this agency has considered and determined that line, marking it as required by law, and that this line, which is not movable but fixed, provides the stability and certainty necessary to make the purchase and exploitation of oil leases on submerged lands a commercial success. To the extent that my analysis is inconsistent with other possible interpretations of the second *California* case, it must be recognized that the usual reasons for strong deference to prior precedent are almost wholly absent here. *Stare decisis* is a valuable principle because by making the governing legal rules predictable, it enables private parties to determine their rights without litigation and enables lower courts to dispose of the great bulk of disputes that do result in litigation. In the present unique situation, however, only a small handful of parties is affected by the governing legal rule; settlement entirely out of court is highly unlikely under the Court's Convention rule; and in practice though not of necessity, cf. 28 U. S. C. § 1251 (b)(2), all these disputes are being brought within the original jurisdiction of this Court. Under these circumstances this Court should certainly not adhere blindly to its previous holdings, particularly where, as here, the State involved was not a party to the prior litigation and the claim raised here by Louisiana under the 1895 Act was never considered in the prior litigation.

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[9] See my dissent filed today in the *Texas Boundary Case*. *Ante*, at 8, n. 2.

II.

In 1895 Congress passed this law:

> "The Secretary of the Treasury is hereby authorized, empowered and directed from time to time to designate and define by suitable bearings or ranges with light houses, light vessels, buoys or coast objects,

> the lines dividing the high seas from rivers, harbors and inland waters." [10]

This 1895 law was the successor of other laws showing congressional interest in marking the boundaries between inland and outer-sea waters.[11] Such marks are necessary in order for ships to know when they must obey local signals in the inland waters of a State, as distinguished from their duty to observe international rules and warnings. Title 33 of the U. S. Code contains our inland water rules, for infraction of which courts can inflict penalties consisting of fines and sometimes ship seizures. The Government argues that it is not the purpose of this statute to give the Secretary power to mark this boundary except to control navigation. To buttress this contention, reference is made to a few sporadic statements by Secretaries who had occasion to mark boundaries and by some legislators who helped pass the statute. But surely the Government is not contending that Congress in solemnly considering over a period of years and then passing this law was doing so as a kind of joke. International and local rules of navigation are serious business and the warnings put out under order of Congress to inform ships where inland waters begin must be acted on and obeyed. Here not only has the line delineating Louisiana's waters been marked but also the State passed Act 33 of 1954 accepting these governmental markings as showing positively and certainly just where its inland water line is located. And there is no danger that this line will be ambulatory since the line is now marked, and will not move as shore conditions change. Nor will future modifications in the line by the Coast Guard disrupt title to these inland waters or to the land and oil beneath them since this Court has repeated several times that a State's territory cannot be taken away from it by Congress without its consent.[12] Such was the understanding of Senator Cordon, floor manager for the Submerged Lands Act, who said:

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[10] 28 Stat. 672. This Act has been changed by substituting for the Secretary of the Treasury the Secretary of Commerce, and later by placing the responsibility with the Commandant of the Coast Guard. Now 33 U. S. C. § 151.

[11] *E. g.*, 23 Stat. 438 (1885); 26 Stat. 320 (1890).

> "The boundaries of the States cannot be changed by Congress without the consent of the States. We cannot do anything legislatively in that field, and we have not sought to do so in this measure."[13]

Acceptance of the Coast Guard's inland water mark for Louisiana fits precisely within the reasons given for utilizing the international Convention in the second *California* case. It will put a stop to eternal litigation and help relieve this Court of the heavy burden repeatedly brought upon us to make decisions none of us have the time or competence to make. It will release the time of the Court to do other and more important things. It will help to end further delay in our giving effect to the desire of Congress to grant the States full ownership and control over submerged lands three miles or three leagues from their coastlines. And it will provide the certainty and stability which are absolutely essential for useful development of our off-shore oil resources.

I dissent from the Court's holding.

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[12] See, *e. g., Fort Leavenworth R. Co.* v. *Lowe,* 114 U. S. 525, 541 (1885); *Geofroy* v. *Riggs,* 133 U. S. 258, 267 (1890).

[13] 99 Cong. Rec. 2634.

UTAH v. UNITED STATES.

ON EXCEPTIONS TO SPECIAL MASTER'S REPORT.

No. 31, Orig. Decided March 3, 1969.

In this dispute between the United States and Utah over ownership of the Great Salt Lake, the Special Master refused to permit the intervention by Morton International, Inc., a claimant to part of the property, because Utah had not waived its sovereign immunity as to Morton's suit. *Held:* The Special Master's Report will be placed on file and his denial of intervention is approved, since a Stipulation entered into between Utah and the United States has so limited the issues that the presence of Morton and other private claimants is neither necessary nor appropriate.

Vernon B. Romney, Attorney General of Utah, *Robert B. Hansen,* Deputy Attorney General, and *Dallin W. Jensen,* Assistant Attorney General, for plaintiff.

Solicitor General Griswold, Assistant Attorney General Martz, Louis F. Claiborne, David R. Warner, and *Martin Green* for the United States.

L. M. McBride, Frank A. Wollaeger, Myer Feldman, and *Martin Jacobs* for Morton International, Inc.

George E. Boss, Raymond T. Senior, Claron C. Spencer, and *Robert D. Larsen* for Great Salt Lake Minerals & Chemicals Corp.

PER CURIAM.

We are called upon to deal with exceptions filed by Morton International, Inc., which protests the decision by our Special Master, Senior Circuit Judge J. Cullen Ganey, denying it leave to intervene as a party defendant in this original action. While we affirm the Master's decision, we do so for reasons which are somewhat different from those advanced in the Master's Report. Consequently, it will be necessary to describe the nature of the underlying controversy before the basis for our disposition of this matter will become clear.

This case arises out of a long-standing dispute between the United States and Utah over the ownership of the Great Salt Lake. The importance and difficulty of the controversy is magnified by the fact that, over the course of years, the lake has proceeded to shrink in size, laying bare some 600,000 acres of land which had formerly been a part of the lakebed (the so-called "relicted" lands). In 1966, Congress moved to resolve the controversy by passing a special Act, 80 Stat. 192, as amended, 80 Stat. 349, which both authorized the Secretary of the Interior to issue a quitclaim deed to the State for the entire federal interest in the lake properties and provided a mechanism by which the fair value of the federal interest could be ascertained. In consideration of the Secretary's deed, Utah was obliged either to pay the Federal Government an amount fixed by the Secretary or bring a lawsuit in this Court so that the extent of the federal claim could be judicially determined.

Utah and the United States, however, are not alone in advancing claims to the still submerged and now-relicted portions of the lake. Morton also claims part of the property, and seeks to intervene to quiet its title. Our Special Master's Report carefully sets out the nature of the competing claims of the two sovereigns and the private landlord:

> "1. The State of Utah claims that on January 4, 1896, the date it was admitted to the Union, the Great Salt Lake was a navigable body of water. On the basis of this fact and the 'equal footing doctrine,' it asserts that it is the owner of the Lake's bed as delineated and determined by the official surveyed meander line and that the land (some 600,000 acres) left exposed by the recession of the Lake between

the water's edge and the meander line, known as 'public domain reliction,' is part of that bed. . . .

"2. The United States claims, excluding those exposed lands lakeward from the upland[1] transferred to patentees, title to a substantial portion (some 325,574 acres) of the exposed lands (known as 'public domain reliction' lands) claimed by Utah as part of the Lake's bed. The basis for this claim is that it was the original owner of the uplands and for that reason it is entitled to the exposed lands under the common-law doctrine of reliction.[2]

"3. Private vendees or patentees of the Lake's uplands whose interest can be traced to the United States claim all the land lakeward fronting such uplands. Their claims do not stop at the water's edge but continue to the thread of the Lake. They contend that the patents impliedly passed title to the relicted land to the owner of the adjoining uplands. The combined area of the exposed land claimed by this group amounts to approximately 275,000 acres. Morton is a good example of one of this group.

"4. In addition, however, the United States also claims the relicted land fronting the uplands of some of the patentees (or those claiming through them) under the so-called Basart doctrine. The total area claimed under this doctrine is approximately 108,780 acres, and is referred to as 'public land reliction under Basart.' These private owners

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[1] Uplands are lots above and adjacent to the meander line. (This is Master Ganey's footnote. The Master's other footnotes have been omitted.)

[2] The United States also advances a claim, not here detailed by the Master, to certain portions of the still submerged lands as well as the brines and minerals in the lake.

> [including Morton], of course, disagree that the Basart doctrine is applicable to these lands." Master's Report 6–8.

The Special Master found that the claim raised by Morton and the claims raised in the "main action have a question of law or fact in common" and that, consequently, "a district judge would exercise his discretion and permit [Morton] to intervene in the action." Report 39. The Special Master, however, refused to take this step only because he found that the State of Utah had not waived its sovereign immunity as to Morton's suit.

Upon careful consideration, we do not find it necessary to reach the ground adopted in the Report. For we have concluded that a Stipulation entered into between the United States and Utah, which was presented to the Master, has so limited the issues before this Court that the presence of Morton and similar property owners is neither necessary nor appropriate. Hence, in the exercise of our discretion, we find that the interests of justice and sound judicial administration will best be served if Morton's motion is denied.

The entry of the Stipulation significantly changes the nature of the problem before us. If the Stipulation had never been filed, it is clear that Utah could have attempted to defeat the federal claim to the *Basart* lands by proving that private landlords like Morton had the best title to them. In such a situation, Morton's right to intervene would have had a substantial basis. For if Utah sought to invoke Morton's title to avoid payment to the United States, it would seem fairest to permit Morton to speak for itself. The Stipulation makes it clear, however, that Utah will not attempt to defeat the United States' claim to the *Basart* lands by proving that the private landowners have the best title to this acreage. In other words, if Utah does not prove that *it* owns the lake properties, it has agreed to pay the United States regardless of the other clouds on the federal claim.

On its side, the United States has also taken steps to remove the *Basart* question from this lawsuit by means of the Stipulation. It has agreed that it will not demand payment for its *Basart* claims, if the Court finds that its claims to the other disputed acreage have no merit. Consequently, it will be unnecessary to consider whether the United States or the private landowners have title to the *Basart* lands in order to determine whether the State must pay fair value to the United States in consideration for the Secretary's quitclaim deed. Thus, if the Stipulation is valid, the substantial need for Morton's presence no longer exists.

Morton, however, attacks the validity of the Stipulation agreed upon by the two sovereigns.[3] While it does not deny that the parties to an ordinary lawsuit may limit the issues they will tender to the Court for decision, Morton points out that this is no ordinary lawsuit, but one whose nature is defined by the special Act of Congress, *supra,* in which the United States waived its immunity in this litigation. Morton argues that the Stipulation has transformed the suit in a way that is contrary to Congress' intention, and that consequently this Court should not accept the parties' attempt to narrow the issues.

We cannot, however, accept the premise upon which Morton's argument is based. We find that the Stipulation does not transform the action in a way which Congress would have disapproved. The structure of the relevant Act indicates decisively that Congress did not anticipate that this action would necessarily lead to an adjudication of the private parties' claims to the *Basart* lands. Section 5 of the Act gave Utah the right to pay over an amount of money determined by the Secretary of the Interior after the Secretary had given "consideration to all factors he deems pertinent to an equitable resolution of the question of the proper consideration to be paid by the State of Utah . . . ." If the State had taken this option, the private landowners would never of course have had an opportunity to invoke the original jurisdiction of this Court since Utah would never have filed its complaint. Consequently, it is difficult to believe that the will of Congress will be frustrated if the issues tendered to this Court by the sovereigns are structured so that we may resolve their dispute without considering the additional claims advanced by the private parties.[4]

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[3] While in the original Stipulation, the two sovereigns sought to defer decision as to which of them owned the still submerged lands under the lake, as well as the lake's brines and minerals, the Special Master ruled that the United States must contest the State's claims to these resources in the present action. Neither the State nor the Federal Government has contested this aspect of the Master's ruling.

Similarly, we do not find any merit in Morton's challenge to that part of the Stipulation in which the United States has promised not to demand payment for its *Basart* claims, if its other claims are not vindicated. Morton argues that the Solicitor General is without authority to give away potentially valuable property when Congress has expressly required that the Nation receive fair value. But this argument ignores the fact that the Solicitor General has indicated in his brief that he believes he can advance no colorable argument which could conceivably vindicate the Federal Government's *Basart* interest if the Government's right to the other disputed property is not upheld. This being so, the Solicitor General, acting under his broad authority to conduct the Federal Government's litigation in this Court, 28 U. S. C. § 518 (1964 ed., Supp. III), was surely entitled to remove the issue from the case.

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[4] Indeed, § 2 of the Act contains a proviso which declares that "the provisions of this Act shall *not* affect (1) any valid existing rights or interests, if any, of any person, partnership, association, corporation, or other nongovernmental entity, in or to any of the lands within and below said meander line . . . ." (Emphasis supplied.) This language suggests that Congress expected that the interests of the private parties would not be adjudicated here.

Finally, Morton claims that under Rule 19 (a) of the Federal Rules of Civil Procedure it should be permitted to intervene because its absence will "leave [one] of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." Morton contends that Utah may be obliged to pay the United States for the *Basart* claims in this present action, only to have another Court later find that the private landowners in fact have the best title, requiring Utah to pay again if it wishes to control the *Basart* lands. But Utah has never favored Morton's motion to intervene, despite the fact that the company's absence here may mean that the State may ultimately be obliged to pay for the lands a second time. Indeed, Utah has consistently opposed Morton's motion. Since the Federal Rules are a guide to the conduct of original actions in this Court only "where their application is appropriate," Rule 9 (2) of the Rules of Court, and since our original jurisdiction should be invoked sparingly, we hold that the State of Utah may properly waive the protection of Rule 19 here.[5]

While we can perceive no compelling reason requiring the presence of Morton in this lawsuit, there are substantial reasons for denying intervention. If Morton is admitted, fairness would require the admission of any of the other 120 private landowners who wish to quiet their title to portions of the relicted lands, greatly increasing the complexity of this litigation. Moreover, if any private landlord who is a citizen of Utah should seek to intervene, we would be required to decide the difficult constitutional question as to whether this Court may retain its original jurisdiction over an action in which complete diversity of citizenship no longer exists between the contesting parties.

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[5] Thus, we need not determine the conditions under which Rule 19 (a) may properly be waived by the party it protects in an ordinary litigation in the district courts.

With the issues limited by the Stipulation, we find, as did the Special Master, that the Solicitor General may be relied upon to represent the limited interests of the private landlords in this case. While Morton doubtless wishes to have us settle its additional claims, we decline to permit intervention for the sole purpose of permitting a private party to introduce new issues which have not been raised by the sovereigns directly concerned. We are thus constrained to require the company to seek another forum which may, with greater efficiency, hear and decide its claims, together with any defenses the sovereign concerned wishes to interpose.

We also agree with the Special Master that "it is equitable and in good conscience to proceed to adjudicate the controversy between the State of Utah and the United States" in Morton's absence, Report 47, and we hereby authorize him to proceed to the merits.

The Report of the Special Master will be placed on file and his determination denying intervention to Morton International, Inc., is approved.[6]

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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[6] Before the United States and Utah entered their Stipulation, the Great Salt Lake Minerals & Chemical Corp. sought to intervene in this action. While the Master denied this motion as well as Morton's, M&C has chosen to acquiesce in the Master's decision so long as the Stipulation is approved. Thus, no further action on this motion is required in the light of our disposition here.

BOKULICH ET AL. *v.* JURY COMMISSION OF GREENE COUNTY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA.

No. 1255, Misc. Decided March 3, 1969.

Appellants had been arrested on charges of grand larceny. They sought an injunction to prevent the grand jury from considering the larceny charges on the ground that Negroes had been systematically excluded from the grand jury. The District Court found that the grand jury was illegally constituted but refused to prevent it from considering the criminal charges. *Held:* The District Court did not abuse its discretion in refusing to enjoin the grand jury proceedings.

298 F. Supp. 181, affirmed.

Morton Stavis, Arthur Kinoy, William M. Kunstler, Donald A. Jelinek, and *Alvin Bronstein* for appellants.

MacDonald Gallion, Attorney General of Alabama, and *Robert P. Bradley,* Assistant Attorney General, for appellees.

PER CURIAM.

The motion of the appellants for leave to proceed *in forma pauperis* is granted.

Appellants, civil rights workers, were arrested on charges of grand larceny. Together with other persons who are not parties to this appeal, the appellants were plaintiffs in this suit before a three-judge court. The complaint charged that Negroes had been systematically excluded from the grand and petit juries in Greene County and that the all-white county jury commission was unconstitutionally constituted. It sought declaratory and injunctive relief against continued discrimination in the selection of juries, against statutes that allegedly authorized the discrimination, and against the State Governor's practice of selecting only white jury commissioners for Greene County. The appellants sought also an injunction to prevent the grand jury of Greene County from considering the criminal charges against them.

The District Court held that Negroes had been systematically and purposely excluded from the jury rolls of Greene County, Alabama, and that this discriminatory exclusion violated the appellants' rights to equal protection and due process. It issued an injunction against discriminatory exclusion of Negroes from jury service in Greene County, and it ordered the appellees to take prompt action to compile a jury list on a nondiscriminatory basis. The court refused, however, to prevent the grand jury from considering the criminal charges against the appellants. This appeal presents only the issue whether the District Court erred in so ruling.[1]

We hold that the District Court did not abuse its discretion. The District Court was warranted in assuming that the constitutional defects of which the appellants complained might be promptly remedied by compliance with its order that juries be reconstituted on a nondiscriminatory basis. If they were not, and if the appellants were in fact indicted, the appellants could raise any objection to the composition of the jury as a defense to their prosecutions. In these circumstances the court could properly conclude that this was not one of "those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent." *Douglas* v. *Jeannette,* 319 U. S. 157, 163 (1943).[2] Accordingly, we affirm that part of the District Court's judgment that denied an injunction preventing the Greene County grand jury from considering criminal charges against the appellants.

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[1] In No. 908 the plaintiffs in the court below other than the appellants in the present case appeal from the District Court's determinations that the challenged Alabama statutes are not unconstitutional and that the Greene County jury commission was not proved to have been illegally constituted. We have today noted probable jurisdiction of that appeal. 393 U. S. 1115.

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[2] We do not reach the issue whether 28 U. S. C. § 2283 would bar the injunction sought even if irreparable injury had been shown. Cf. *Dombrowski* v. *Pfister,* 380 U. S. 479, 484, n. 2 (1965).

BLACK UNITY LEAGUE OF KENTUCKY ET AL. *v.* MILLER ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 892. Decided March 3, 1969.

Dismissal of appellant organizations' suit for injunctive and declaratory relief against threatened investigations by Kentucky Un-American Activities Committee upheld as appellants failed to respond to motion to dismiss as required by local court rules and trial court could thus take conclusory allegations of irreparable injury as insubstantial and not justifying federal intervention.

Affirmed.

William M. Kunstler, Arthur Kinoy, Robert Allen Sedler, and *Morton Stavis* for appellants.

W. Scott Miller, Jr., pro se, and for other appellees.

PER CURIAM.

Appellant organizations brought this suit for injunctive and declaratory relief against investigations which appellees, members of the Kentucky Un-American Activities Committee, were allegedly threatening to conduct. They contended that the investigations and accompanying contempt prosecutions would violate various rights, primarily those under the First and Fourteenth Amendments. They did not allege that any of their officers or members had been called as witnesses, or that any subpoenas had been issued, or that any criminal prosecutions had been begun. The allegations of harassment were entirely conclusory. Appellees moved to dismiss, and appellants failed to respond, as was required by local court rules. These rules also stated that "[f]ailure to respond may be good grounds for sustaining the motion." D. C. W. D. Ky. Rule 5 (a). We hold that in this procedural context the trial court could take appellants' conclusory allegations as insubstantial and could dismiss the complaint for failure to allege sufficient irreparable injury to justify federal intervention at this early stage. For this reason, the motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE DOUGLAS dissents.

HOLDEN ET AL. *v.* ARNEBERGH, CITY ATTORNEY OF LOS ANGELES, ET AL.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 945. Decided March 3, 1969.

265 Cal. App. 2d 87, 71 Cal. Rptr. 401, appeal dismissed.

Burton Marks for appellants.

Roger Arnebergh, pro se, and *Robert B. Burns* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed, it appearing that the judgment below rests upon an adequate state ground.

GOLDEN, ACTING DISTRICT ATTORNEY OF KINGS COUNTY *v.* ZWICKLER.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

No. 370. Argued January 16, 1969.—Decided March 4, 1969.

Following reversal on state law grounds of appellee's conviction of violating a New York statute by distributing anonymous handbills in connection with the 1964 congressional election, appellee in 1966 sought a declaratory judgment in the District Court that the statute was unconstitutional. Appellee alleged that he intended to distribute the 1964 handbill and "similar anonymous leaflets" in connection with the forthcoming 1966 election (when, it was alleged, the Congressman would stand for re-election), and in subsequent elections. The District Court abstained from passing on appellee's claim for a declaratory judgment. This Court on appeal held that such abstention was error and remanded the case for resolution of the declaratory judgment issue. *Zwickler* v. *Koota,* 389 U. S. 241. The Court held that on the remand appellee would have to "establish the elements governing the issuance of a declaratory judgment," noting as relevant to that question that the Congressman who had been the target of appellee's handbills had meanwhile been elected to the Supreme Court of New York. On remand, the District Court, without hearing evidence on the existence of the elements governing the issuance of a declaratory judgment, held that the essential elements to such relief existed "[w]hen this action was initiated" and that it was immaterial that the Congressman would not be a candidate for re-election, and concluded that the statute impinged on appellee's freedom of speech by deterring him from again distributing anonymous handbills. *Held:*

1. In the field of declaratory judgments as elsewhere constitutional issues cannot be adjudicated except in actual cases presenting concrete legal issues. P. 108.

2. Since the New York statute prohibits only anonymous handbills directly pertaining to election campaigns and it was wholly conjectural that another occasion might arise when appellee would be prosecuted for distributing the handbills referred to in the complaint because his sole concern related to a Congressman who

would not likely be a candidate again, the controversy here lacked "sufficient immediacy and reality" to warrant issuance of a declaratory judgment. Pp. 109–110.

290 F. Supp. 244, reversed and remanded.

Samuel A. Hirshowitz, First Assistant Attorney General of New York, argued the cause for appellant. With him on the brief were *Louis J. Lefkowitz,* Attorney General, and *Brenda Soloff,* Assistant Attorney General.

Emanuel Redfield argued the cause and filed a brief for appellee.

Joseph B. Robison and *Beverly Coleman* filed a brief for the American Jewish Congress, as *amicus curiae,* urging affirmance.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case was here before as *Zwickler* v. *Koota,* 389 U. S. 241 (1967). We there held that the three-judge District Court for the Eastern District of New York erred in abstaining from deciding whether Zwickler, appellee in the instant case, was entitled to a declaratory judgment respecting the constitutionality of New York Penal Law § 781–b, now New York Election Law § 457, and we remanded to the District Court for a determination of that question. Section 781–b made it a crime to distribute anonymous literature in connection with an election campaign.[1] Zwickler had been convicted of violating this provision by distributing anonymous handbills in connection with the 1964 congressional election. That conviction was reversed, on state law grounds, by the New York Supreme Court, Appellate Term. The New York Court of Appeals affirmed in 1965 and filed a memorandum which stated that constitutional questions had not been reached. 16 N. Y. 2d 1069, 213 N. E. 2d 467. A few months thereafter, on April 22, 1966, Zwickler brought this suit.

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[1] Section 781–b, in pertinent part, made it a misdemeanor to "distribute in quantity . . . any handbill . . . which contains any statement . . . concerning any political party, candidate . . . in connection with any election of public officers, party officials . . . without . . . reproducing thereon . . . the name and post-office address of the . . . person . . . at whose instance . . . such handbill . . . is so . . . distributed . . . ."

The complaint sets forth the facts regarding the prosecution and its termination. A Congressman standing for re-election in 1964 was criticized in the anonymous handbill for opposing two amendments to the 1964 Foreign Aid bill.[2] The complaint alleged that the

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[2] The text of the 1964 handbill is as follows:

"REPRESENTATIVE MULTER—EXPLAIN YOUR POSITIONS

"AID TO NASSER

"On September 2, 1964, an amendment was proposed to a foreign aid bill (Public Law 480). In substance, it would have cut off all aid to the United Arab Republic. Congressman Multer spoke at length against the amendment, and in his own words, urged its defeat 'as earnestly as I can.' He stated that his position was based on 'humanitarian instinct.' (Congressional Record 20792.)

"In this respect, the following should be noted

"(a) Congressman Multer's stand permits the diversion of funds by Dictator Nasser to his armaments buildup.

"(b) The United Arab Republic is also a recipient of aid from Communist Russia.

"(c) Egypt is now employing the technical skills of scientists, formerly under the employ of the Nazis.

"(d) Congressman Multer debated against the amendment on the eve of the summit conference held in Cairo by 13 Arab States which are threatening the peace of the Near East and the State of Israel in particular.

"SOVIET ANTI-SEMITISM

"The 1964 Foreign Aid bill was passed in the United States Senate with an amendment sponsored by Senator Abraham Ribicoff (D., Conn.) that strongly condemned the anti-Semitic practices of the

Congressman "will become a candidate in 1966 for reelection . . . and has been a political figure and public official for many years," and that Zwickler "desires and intends to distribute . . . at the place where he had previously done so and at various places in said [Kings] County, the anonymous leaflet herein described . . . and similar anonymous leaflets . . . at any time during the election campaign of 1966 and in subsequent election campaigns or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign of 1966."

It was disclosed on the argument of *Zwickler* v. *Koota* in this Court that the Congressman had left the House of Representatives for a place on the Supreme Court of New York. We deemed this development relevant to the question whether the prerequisites for the issuance of a declaratory judgment were present. We noted, however, that, probably because of the decision to abstain, the parties had not addressed themselves to, and the District Court had not adjudicated, that question. 389 U. S., at 244, n. 3. Therefore, we directed that on the remand "appellant [Zwickler] must establish the elements governing the issuance of a declaratory

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Soviet Union. When this issue was brought to the House-Senate conferees, a much more general statement decrying all types of religious bigotry was adopted.

"Representative Multer praised this 'watered down' measure on the House floor, and stated:

" 'While the Senate version did point the finger directly at Soviet Russia, the version as finally adopted, I think, is much the better one.

" 'I believe, instead of pointing the finger at the culprit now before the bar of world public opinion where it is being so severely condemned, it is much better that this Congress go on record as it is doing now, against religious persecution wherever it may raise its ugly head.' (Congressional Record 22850.)

"WHY MR. MULTER, WHY? ? ? ? ?"

judgment." *Id.*, at 252, n. 15; see also *id.*, at 252–253, n. 16.

The District Court hearing on the remand was limited largely to the oral argument of counsel, and no testimony was taken concerning the existence of the elements governing the issuance of a declaratory judgment. The three-judge court held that the prerequisites of a declaratory judgment had been established by the facts alleged in the complaint, and that the fact that the Congressman who was the original target of the handbills would not again stand for re-election did not affect the question. The court said:

> "The attempt of defendant to moot the controversy and thus to abort a declaration of constitutional invalidity by citing the circumstance that the Congressman concerning whom the Zwickler handbill was published has since become a New York State Supreme Court Justice must fail. When this action was initiated the controversy was genuine, substantial and immediate, even though the date of the election to which the literature was pertinent had already passed.
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> . . . . .
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> ". . . The fortuitous circumstance that the candidate in relation to whose bid for office the anonymous handbill was circulated had, while vindication inched tediously forward, removed himself from the role of target of the 1964 handbill does not moot the plaintiff's further and far broader right to a general adjudication of unconstitutionality his complaint prays for. We see no reason to question Zwickler's assertion that the challenged statute currently impinges upon his freedom of speech by deterring him from again distributing anonymous handbills. His own interest as well as that of others who would with like anonymity practise free speech in a

> political environment persuade us to the justice of his plea." 290 F. Supp. 244, 248, 249 (1968).

We noted probable jurisdiction *sub nom. Koota* v. *Zwickler,* 393 U. S. 818 (1968). We reverse.

The District Court erred in holding that Zwickler was entitled to declaratory relief if the elements essential to that relief existed "[w]hen this action was initiated." The proper inquiry was whether a "controversy" requisite to relief under the Declaratory Judgment Act existed at the time of the hearing on the remand.[3] We now undertake that inquiry.

"[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite. This is as true of declaratory judgments as any other field." *United Public Workers of America* v. *Mitchell,* 330 U. S. 75, 89 (1947). "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.,* 312 U. S. 270, 273 (1941).

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[3] The Declaratory Judgment Act, 28 U. S. C. § 2201, expressly provides: "*In a case of actual controversy* within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." (Emphasis added.)

We think that under all the circumstances of the case the fact that it was most unlikely that the Congressman would again be a candidate for Congress precluded a finding that there was "sufficient immediacy and reality" here.[4] The allegations of the complaint focus upon the then forthcoming 1966 election when, it was alleged, the Congressman would again stand for re-election. The anonymous handbills which the complaint identified as to be distributed in the 1966 and subsequent elections were the 1964 handbill and "similar anonymous leaflets." On the record therefore the only supportable conclusion was that Zwickler's sole concern was literature relating to the Congressman and his record.[5] Since the New York statute's prohibition of anonymous handbills applies only to handbills directly pertaining to election campaigns, and the prospect was neither real nor immediate of a campaign involving the Congressman, it was wholly conjectural that another occasion might arise when Zwickler might be prosecuted for distributing the handbills referred to in the complaint. His assertion in his brief that the former Congressman can be "a candidate for Congress again" is hardly a substitute for evidence that this is a prospect of "immediacy and reality." Thus the record is in sharp contrast to that in *Evers* v. *Dwyer,* 358 U. S. 202 (1958), relied upon by the District Court.

It was not enough to say, as did the District Court, that nevertheless Zwickler has a "further and far broader right to a general adjudication of unconstitutionality . . . [in] [h]is own interest as well as that of others who would with like anonymity practise free speech in a political environment . . . ." The constitutional question, First Amendment or otherwise, must be presented in the context of a specific live grievance. In *United Public Workers of America* v. *Mitchell, supra,* at 89–90, we said:

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[4] The former Congressman's term of office as a State Supreme Court Justice is 14 years.

[5] The allegation of the complaint that Zwickler might distribute anonymous handbills relating to "party officials" does not indicate otherwise. The Congressman held an elective party position as a district leader. See 290 F. Supp., at 248.

> "The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough."

The same is true of the power to pass upon the constitutionality of state statutes. No federal court, whether this Court or a district court, has "jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, *except as it is called upon to adjudge the legal rights of litigants in actual controversies.*" *Liverpool, N. Y. & P. S. S. Co.* v. *Commissioners,* 113 U. S. 33, 39 (1885). (Emphasis added.) See also *United States* v. *Raines,* 362 U. S. 17, 21 (1960). The express limitation of the Declaratory Judgment Act to cases "of actual controversy" is explicit recognition of this principle.

We conclude that Zwickler did not establish the existence at the time of the hearing on the remand of the elements governing the issuance of a declaratory judgment, and therefore that the District Court should have dismissed his complaint. We accordingly intimate no view upon the correctness of the District Court's holding as to the constitutionality of the New York statute. The judgment of the District Court is reversed, and the case is remanded with direction to enter a new judgment dismissing the complaint.

It is so ordered.

GREGORY ET AL. v. CITY OF CHICAGO.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 60. Argued December 10, 1968.—Decided March 10, 1969.

Petitioners, peaceful civil rights demonstrators, were arrested and convicted for disorderly conduct when they failed to disperse on orders of the Chicago police, who anticipated civil disorder because of the bystanders' unruly conduct. The Illinois Supreme Court affirmed. *Held:*

1. Petitioners were denied due process since there was no evidentiary support for their convictions. *Thompson* v. *City of Louisville*, 362 U. S. 199. P. 112.

2. The convictions were for demonstrating, not for refusing to obey police orders. P. 112.

3. The trial judge's charge allowed the jury to convict for acts protected by the First Amendment. *Stromberg* v. *California*, 283 U. S. 359. P. 113.

39 Ill. 2d 47, 233 N. E. 2d 422, reversed.

Marshall Patner argued the cause for petitioners. With him on the briefs was *Paul E. Goldstein*.

Raymond F. Simon argued the cause for respondent. With him on the brief were *Marvin E. Aspen* and *Howard C. Goldman*.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This is a simple case. Petitioners, accompanied by Chicago police and an assistant city attorney, marched in a peaceful and orderly procession from city hall to the mayor's residence to press their claims for desegregation of the public schools. Having promised to cease singing at 8:30 p. m., the marchers did so. Although petitioners and the other demonstrators continued to march in a completely lawful fashion, the onlookers became unruly as the number of bystanders increased.

Chicago police, to prevent what they regarded as an impending civil disorder, demanded that the demonstrators, upon pain of arrest, disperse. When this command was not obeyed, petitioners were arrested for disorderly conduct.

Petitioners' march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment. See *Shuttlesworth* v. *City of Birmingham, post,* p. 147; *Brown* v. *Louisiana,* 383 U. S. 131, 141–142 (1966) (prevailing opinion of MR. JUSTICE FORTAS); *Henry* v. *City of Rock Hill,* 376 U. S. 776 (1964); *Fields* v. *South Carolina,* 375 U. S. 44 (1963), reversing 240 S. C. 366, 126 S. E. 2d 6 (1962). There is no evidence in this record that petitioners' conduct was disorderly. Therefore, under the principle first established in *Thompson* v. *City of Louisville,* 362 U. S. 199 (1960), convictions so totally devoid of evidentiary support violate due process.

The opinion of the Supreme Court of Illinois suggests that petitioners were convicted not for the manner in which they conducted their march but rather for their refusal to disperse when requested to do so by Chicago police. See 39 Ill. 2d 47, 60, 233 N. E. 2d 422, 429 (1968). However reasonable the police request may have been and however laudable the police motives, petitioners were charged and convicted for holding a demonstration, not for a refusal to obey a police officer.* As we said in *Garner* v. *Louisiana,* 368 U. S. 157, 164 (1961): "[I]t is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction." See also *In re Oliver,* 333 U. S. 257, 273 (1948).

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*The trial judge charged solely in terms of the Chicago ordinance. Neither the ordinance nor the charge defined disorderly conduct as the refusal to obey a police order.

Finally, since the trial judge's charge permitted the jury to convict for acts clearly entitled to First Amendment protection, *Stromberg* v. *California,* 283 U. S. 359 (1931), independently requires reversal of these convictions.

The judgments are *Reversed.*

MR. JUSTICE DOUGLAS, while joining the concurring opinion of MR. JUSTICE BLACK, also joins this opinion.

MR. JUSTICE STEWART and MR. JUSTICE WHITE concur in the judgment of the Court and join its opinion insofar as it holds that under the principle established by *Stromberg* v. *California,* 283 U. S. 359, the petitioners' convictions cannot stand.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

This I think is a highly important case which requires more detailed consideration than the Court's opinion gives it. It in a way tests the ability of the United States to keep the promises its Constitution makes to the people of the Nation. Among those promises appearing in the Preamble to the Constitution are the statements that the people of the United States ordained this basic charter "in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity . . . and secure the Blessings of Liberty to ourselves and our Posterity . . . ." Shortly after the original Constitution was adopted, again undoubtedly in an attempt to "secure the Blessings of Liberty," the Bill of Rights was added to the Constitution, in which the First Amendment, later made applicable to the States by the Fourteenth Amendment, provides that: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

In 1954 our Court held that laws segregating people on the basis of race or color in the public schools unconstitutionally denied Negroes equal protection of the laws.[1] Negroes, and many others who sympathized with them, cooperatively undertook to speed up desegregation. These groups adopted plans under which they marched on the streets carrying placards, chanting, and singing songs, all designed to publicize their grievances and to petition the various units of government, state and national, for a redress of these grievances. Their activities along these lines quite obviously aroused highly emotional feelings both on their part and on the part of others who opposed the changes in local laws and customs which the "picketers" and "demonstrators" advocated. Agitation between groups brought about sharp conflicts and clashes, threats, fights, riots, and near-riots. This Court, to be sure, has had its difficulties and sharp differences of opinion in deciding the precise boundaries dividing what is constitutionally permissible and impermissible in this field.[2] There have also been sharp disputes over whether the Court can hold laws unconstitutional because the Court deems them to be "unreasonable," "arbitrary," or contrary to fundamental standards of ethics, morals, or conscience.[3] Fortunately, however, these differences need not concern us here. For while we have pointed out in many cases that the States and their subordinate units do have constitutional power to regulate picketing, demonstrating, and parading by statutes and ordinances narrowly drawn so as not to abridge the rights of speech, press, assembly, or petition, neither Chicago nor Illinois at the time these petitioners were demonstrating had passed any such narrowly drawn laws.[4]

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[1] *Brown* v. *Board of Education,* 347 U. S. 483 (1954).

[2] See, *e. g., Cox* v. *Louisiana,* 379 U. S. 536 (1965); *Adderley* v. *Florida,* 385 U. S. 39 (1966).

[3] See, *e. g., Chambers* v. *Florida,* 309 U. S. 227, 235-236, n. 8 (1940); *Rochin* v. *California,* 342 U. S. 165 (1952); *id.,* at 174 (concurring opinion); *Ferguson* v. *Skrupa,* 372 U. S. 726 (1963).

The facts upon which these arrests and convictions for disorderly conduct occurred were these.

Petitioner Gregory and his group had become dissatisfied because Benjamin Willis, Superintendent of Chicago's public school system, was not moving speedily enough to desegregate the public schools. While Mayor Daley did not appear to have legal authority to remove Dr. Willis,[5] the group evidently believed the Mayor could cause him to be removed if he wanted to do so, and their prodding was therefore directed at the Mayor as well as against Willis. The group march began near the Chicago Loop District at 4:30 p. m. and ended five miles away in the neighborhood of Daley's home. A lieutenant of police, four police sergeants, and about forty policemen met Gregory at the gathering place in Grant Park. There Gregory addressed the marchers, saying:

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[4] The nearest thing to such a law in existence at that time was § 36-31 of the Municipal Code of Chicago, which required written permits for parades on "any public way" or for "any open air public meeting . . . in or upon any public way." Petitioners were neither charged with nor convicted for the offense of failing to obtain a written permit. Indeed, the city clearly gave its effective permission to the marchers by sending a city attorney and a detail of specially trained officers to protect them along every foot of their march. Since "[d]eeply embedded traditional ways of carrying out state policy . . . are often tougher and truer law than the dead words of the written text," *Nashville, C. & St. L. R. Co.* v. *Browning*, 310 U. S. 362, 369 (1940), this march could not be considered illegal in and of itself.

[5] Respondent asserts that under Ill. Rev. Stat., c. 122, § 34-13 (1967), the Superintendent of Schools is accountable solely to the Board of Education and not to the Mayor.

> "First we will go over to the snake pit [city hall]. When we leave there, we will go out to the snake's house [the mayor's home]. Then, we will continue to go out to Mayor Daley's home until he fires Ben Willis [Superintendent of Schools]."

The demonstrators marched to the city hall, and then they marched to the Mayor's home about five miles away, arriving at about 8 p. m. The demonstrators were accompanied by the police and by the Assistant City Attorney from the park to the Mayor's home. When they reached this neighborhood, the demonstrators began marching around and around near the Mayor's home. Meanwhile the crowd of spectators from the neighborhood kept increasing, and its language and conduct became rougher and tougher. The events leading up to the arrest of the demonstrators are set out in detail in the opinion of the Illinois Supreme Court, and I agree fully with that court's description of these events, which I have reprinted as an appendix to this opinion. This episode finally came to a conclusion at about 9:30 p. m. Fearful that the threatening crowd of onlookers could no longer be contained, the police asked Gregory and his marchers to leave the area. When they refused, they were arrested and charged with violation of Chicago's disorderly conduct ordinance, which provides as follows:

> "All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the city; all persons who shall collect in bodies or crowds for unlawful purposes, or for any purpose, to the annoyance or disturbance of other persons; . . .

> shall be deemed guilty of disorderly conduct, and upon conviction thereof, shall be severally fined not less than one dollar nor more than two hundred dollars for each offense." Municipal Code of Chicago, § 193–1.

I agree with the Illinois Supreme Court that the "record shows a determined effort by the police to allow the marchers to peacefully demonstrate and at the same time maintain order." I also think the record shows that outside of the marching and propagandizing of their views and protests, Gregory and his group while marching did all in their power to maintain order. Indeed, in the face of jeers, insults, and assaults with rocks and eggs, Gregory and his group maintained a decorum that speaks well for their determination simply to tell their side of their grievances and complaints. Even the "snake" and "snake pit" invectives used by Gregory and his demonstrators, unlike some used by their hecklers, remained within the general give-and-take of heated political argument. Thus both police and demonstrators made their best efforts faithfully to discharge their responsibilities as officers and citizens, but they were nevertheless unable to restrain the hostile hecklers within decent and orderly bounds. These facts disclosed by the record point unerringly to one conclusion, namely, that when groups with diametrically opposed, deep-seated views are permitted to air their emotional grievances, side by side, on city streets, tranquility and order cannot be maintained even by the joint efforts of the finest and best officers and of those who desire to be the most law-abiding protestors of their grievances.

It is because of this truth, and a desire both to promote order and to safeguard First Amendment freedoms, that this Court has repeatedly warned States and governmental units that they cannot regulate conduct connected with these freedoms through use of sweeping, dragnet statutes that may, because of vagueness, jeopardize these freedoms. In those cases, however, we have been careful to point out that the Constitution does not bar enactment of laws regulating conduct, even though connected with speech, press, assembly, and petition, if such laws specifically bar only the conduct deemed obnoxious and are carefully and narrowly aimed at that forbidden conduct.[6] The dilemma revealed by this record is a crying example of a need for some such narrowly drawn law. It is not our duty and indeed not within our power to set out and define with precision just what statutes can be lawfully enacted to deal with situations like the one confronted here by police and protestors, both of whom appear to us to have been conscientiously trying to do their duties as they understood them. Plainly, however, no mandate in our Constitution leaves States and governmental units powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of spots selected by the people either for homes, wherein they can escape the hurly-burly of the outside business and political world, or for public and other buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools, and hospitals.

The disorderly conduct ordinance under which these petitioners were charged and convicted is not, however, a narrowly drawn law, particularly designed to regulate certain kinds of conduct such as marching or picketing or demonstrating along the streets or highways. Nor does it regulate the times or places or manner of carrying on such activities. To the contrary, it might better be described as a meat-ax ordinance, gathering in one comprehensive definition of an offense a number of words which have a multiplicity of meanings, some of which would cover activity specifically protected by the First Amendment. The average person charged with its violation is necessarily left uncertain as to what conduct and attitudes of mind would be enough to convict under it. Who, for example, could possibly foresee what kind of noise or protected speech would be held to be "improper"? That, of course, would depend on sensibilities, nerves, tensions, and on countless other things. As pointed out in *Cantwell* v. *Connecticut,* 310 U. S. 296, 308 (1940), common-law breach of peace is at its best a confusing offense that may imperil First Amendment rights. But how infinitely more doubtful and uncertain are the boundaries of an offense including any "diversion tending to a breach of the peace . . ."! Moreover, the ordinance goes on to state that it shall be a crime for persons to "collect in bodies or crowds for unlawful purposes, or for any purpose, to the annoyance or disturbance of other persons . . . ." Such language could authorize conviction simply because the form of the protest displeased some of the onlookers, and of course a conviction on that ground would encroach on First Amendment rights. See *Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *Edwards* v. *South Carolina,* 372 U. S. 229 (1963); *Cox* v. *Louisiana,* 379 U. S. 536 (1965). And it must be remembered that only the tiniest bit of petitioners' conduct could possibly be thought illegal here—that is, what they did after the policeman's order to leave the area. The right "peaceably to assemble, and to petition the Government for a redress of grievances" is specifically protected by the First Amendment. For the entire five-mile march, the walking by petitioners in a group, the language, and the chants and songs were all treated by the city's assistant attorney and its specially detailed policemen as lawful, not lawless, conduct.

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[6] See, *e. g.*, *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Giboney* v. *Empire Storage Co.*, 336 U. S. 490 (1949); *Scull* v. *Virginia*, 359 U. S. 344 (1959).

The so-called "diversion tending to a breach of the peace" here was limited entirely and exclusively to the fact that when the policeman in charge of the special police detail concluded that the hecklers observing the march were dangerously close to rioting and that the demonstrators and others were likely to be engulfed in that riot, he ordered Gregory and his demonstrators to leave, and Gregory—standing on what he deemed to be his constitutional rights—refused to do so. The "diversion" complained of on the part of Gregory and the other marchers was not any noise they made or annoyance or disturbance of "other persons" they had inflicted. Their guilt of "disorderly conduct" therefore turns out to be their refusal to obey instanter an individual policeman's command to leave the area of the Mayor's home. Since neither the city council nor the state legislature had enacted a narrowly drawn statute forbidding disruptive picketing or demonstrating in a residential neighborhood, the conduct involved here could become "disorderly" only if the policeman's command was a law which the petitioners were bound to obey at their peril. But under our democratic system of government, lawmaking is not entrusted to the moment-to-moment judgment of the policeman on his beat. Laws, that is valid laws, are to be made by representatives chosen to make laws for the future, not by police officers whose duty is to enforce laws already enacted and to make arrests only for conduct already made criminal. One of our proudest boasts is that no man can be convicted of crime for conduct, innocent when engaged in, that is later made criminal. See, *e. g., Chambers* v. *Florida,* 309 U. S. 227, 236 (1940). To let a policeman's command become equivalent to a criminal statute comes dangerously near making our government one of men rather than of laws. See *Cox* v. *Louisiana,* 379 U. S. 559, 579 (1965) (separate opinion). There are ample ways to protect the domestic tranquility without subjecting First Amendment freedoms to such a clumsy and unwieldy weapon.

The City of Chicago, recognizing the serious First Amendment problems raised by the disorderly conduct ordinance as it is written, argues that these convictions should nevertheless be affirmed in light of the narrowing construction placed on the ordinance by the Illinois Supreme Court in this case. That court held that the ordinance

> "does not authorize the police to stop a peaceful demonstration merely because a hostile crowd may not agree with the views of the demonstrators. It is only where there is an imminent threat of violence, the police have made all reasonable efforts to protect the demonstrators, the police have requested that the demonstration be stopped and explained the request, if there be time, and there is a refusal of the police request, that an arrest for an otherwise lawful demonstration may be made." 39 Ill. 2d 47, 60, 233 N. E. 2d 422, 429.

This interpretation of the ordinance is, of course, binding on this Court, and the construction of the Illinois Supreme Court is as authoritative as if this limitation were written into the ordinance itself. But this cannot be the end of our problem. The infringement of First Amendment rights will not be cured if the narrowing construction is so unforeseeable that men of common intelligence could not have realized the law's limited scope at the only relevant time, when their acts were committed, cf. *Lanzetta* v. *New Jersey,* 306 U. S. 451, 456–457 (1939), or if the law remains excessively sweeping even as narrowed, *e. g., Winters* v. *New York,* 333 U. S. 507 (1948). Petitioners particularly press the Court to dispose of the case on this latter ground. They raise troublesome questions concerning the extent to which, even under the narrowed construction, guilt still depends on the mere refusal to obey a policeman's order. And they suggest that the scope of the police obligation to attempt first to deal with the hostile audience is still not made sufficiently clear.

It is not necessary for the Court to resolve such issues in the present case, however, because the Chicago ordinance, as applied here, infringed on First Amendment rights for an even more fundamental reason. Whatever the validity of the Illinois Supreme Court's construction, this was simply not the theory on which these petitioners were convicted. In explaining the elements of the offense to the jury, the trial judge merely read the language of the ordinance. The jury was not asked to find whether, as the Illinois Supreme Court's construction apparently requires, there was "an imminent threat of violence," or whether the police had "made all reasonable efforts to protect the demonstrators." Rather, it was sufficient for the jury to decide that petitioners had made an "improper noise" or a "diversion tending to a breach of the peace," or had "collect[ed] in bodies or crowds for unlawful purposes, or for any purpose, to the annoyance or disturbance of other persons."

In fact, far from taking account of the limiting factors stressed by the Illinois Supreme Court, the judge's charge was based on precisely the opposite theory. The jury was instructed, over petitioners' objection, that "the fact that persons other than these Defendants may or may not have violated any laws or may or may not have been arrested should not be considered by you in determining the guilt or innocence of these Defendants." The significance of this instruction in the context of the evidence at trial is of course apparent—the jury was simply told to ignore questions concerning the acts of violence committed by the crowd of onlookers and attempts made by the police to arrest those directly responsible for them.[7] Under these circumstances, the principle established by *Stromberg* v. *California*, 283 U. S. 359 (1931), compels us to set aside these convictions. As we explained in *Williams* v. *North Carolina*, 317 U. S. 287, 292 (1942):

> "That is to say, the verdict of the jury for all we know may have been rendered on [an unconstitutional] ground alone, since it did not specify the basis on which it rested. It therefore follows here as in *Stromberg* . . . that if one of the grounds for conviction is invalid under the Federal Constitution, the judgment cannot be sustained."

At the time the petitioners were tried, the Illinois Supreme Court had not yet announced its narrowing construction of the Chicago disorderly conduct ordinance. The trial judge's instructions supplied the jury only with the unadorned language of the statute. Thus it is entirely possible that the jury convicted the petitioners on the ground that Gregory and the others who demonstrated with him had, in the language of the ordinance, "collect[ed] in bodies or crowds . . . to the annoyance or disturbance of other persons," simply because the form of their protest had displeased some of the onlookers. Since the petitioners could not constitutionally be convicted on this ground,[8] *Stromberg* compels the reversal of these convictions.[9]

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[7] The trial judge explained the need for this instruction to counsel, in chambers, as follows:

"[T]he record is replete with evidence that a Jury may well consider to establish the violation of the law on the part of the so-called spectators and neighbors, and the record is silent as to whether any of them were arrested or not.

. . . . .

"As far as why didn't they arrest these other people, why didn't they arrest the spectators and so on and so on, it seems to me that by virtue of the way the evidence went in, this will be a question that will bother these Jurors unless it is taken care of."

In agreeing to the reversal of these convictions, however, I wish once more to say that I think our Federal Constitution does not render the States powerless to regulate the conduct of demonstrators and picketers, conduct which is more than "speech," more than "press," more than "assembly," and more than "petition," as those terms are used in the First Amendment. Narrowly drawn statutes regulating the conduct of demonstrators and picketers are not impossible to draft. And narrowly drawn statutes regulating these activities are not impossible to pass if the people who elect their legislators want them passed. Passage of such laws, however, like the passage of all other laws, constitutes in the final analysis a choice of policies by the elected representatives of the people.

I, of course, do not mean to say or even to intimate that freedom of speech, press, assembly, or petition can be abridged so long as the First Amendment remains unchanged in our Constitution. But to say that the First Amendment grants those broad rights free from any exercise of governmental power to regulate conduct, as distinguished from speech, press, assembly, or petition, would subject all the people of the Nation to the uncontrollable whim and arrogance of speakers, and writers, and protesters, and grievance bearers. As Mr. Justice Goldberg wrote for the Court in *Cox* v. *Louisiana,* 379 U. S. 536, 554 (1965):

> "The rights of free speech and assembly, while fundamental in our democratic society, still do not

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[8] See *Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *Edwards* v. *South Carolina,* 372 U. S. 229 (1963); *Cox* v. *Louisiana,* 379 U. S. 536 (1965).

[9] See also *Cole* v. *Arkansas,* 333 U. S. 196 (1948); *Cole* v. *Arkansas,* 338 U. S. 345 (1949).

> mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy."

Were the authority of government so trifling as to permit anyone with a complaint to have the vast power to do anything he pleased, wherever he pleased, and whenever he pleased, our customs and our habits of conduct, social, political, economic, ethical, and religious, would all be wiped out, and become no more than relics of a gone but not forgotten past. Churches would be compelled to welcome into their buildings invaders who came but to scoff and jeer; streets and highways and public buildings would cease to be available for the purposes for which they were constructed and dedicated whenever demonstrators and picketers wanted to use them for their own purposes. And perhaps worse than all other changes, homes, the sacred retreat to which families repair for their privacy and their daily way of living, would have to have their doors thrown open to all who desired to convert the occupants to new views, new morals, and a new way of life. Men and women who hold public office would be compelled, simply because they did hold public office, to lose the comforts and privacy of an unpicketed home. I believe that our Constitution, written for the ages, to endure except as changed in the manner it provides, did not create a government with such monumental weaknesses. Speech and press are, of course, to be free, so that public matters can be discussed with impunity. But picketing and demonstrating can be regulated like other conduct of men. I believe that the homes of men, sometimes the last citadel of the tired, the weary, and the sick, can be protected by government from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown.

For these reasons I concur in the reversal.

APPENDIX TO OPINION OF BLACK, J., CONCURRING.

Excerpt From Opinion of the Supreme Court of Illinois.

"About 4:30 P.M. the marchers, two abreast, walked out of the park and went to the city hall in the loop. The marchers then walked south on State Street to 35th Street and then proceeded west to Lowe Avenue, a distance of about 5 miles from the city hall. The mayor's home is at 3536 South Lowe Avenue. The demonstrators had increased in number to about 85 and they arrived at the mayor's home about 8:00 o'clock P.M. In addition to the police, the marchers were accompanied by their attorney and an assistant city counsel. At the suggestion of an assistant city counsel, Gregory had agreed that the group would quit singing at 8:30 P.M. Commander Pierson, district commander of the 9th police district which encompasses this area, met Lieutenant Hougeson at the corner of 35th and Lowe and assumed command of the police operations.

"There were about 35 people on the corner and a group of about 6 or 8 youngsters carrying a sign 'We Love Mayor Daley' tried to join the marchers but the police stopped them. As the demonstrators started south into the 3500 block of Lowe Avenue, Gregory testified he went back through the line to tell everyone just to keep singing and to keep marching. 'Don't stop and don't answer any one back. Don't worry about anything that is going to be said to you. Just keep marching. If anyone hits you or anything, try to remember what they look like, but above all means, do not hit them back. Keep the line straight and keep it tight.' The demonstrators chanted 'Ben Willis must go, Snake Daley, also;' 'Ben Willis must go—When?—Now;' 'We are going to the home of the snake, the snake pit is down the street;' 'Hey, Hey, what do you know, Ben Willis must go' and 'Hey, Hey, what do you know, Mayor Daley must go also.' They carried signs which read: 'Daley fire Willis;' 'Defacto, Desmacto, it is still segregation;' 'Ben Willis must go—now;' and 'Mayor Daley, fire Ben Willis.' They also sang the civil rights songs, 'We Shall Overcome' and 'We Shall Not Be Moved.'

"The police ordered the taverns closed during the march. Police from the task force, the 9th district and other districts surrounded the block in which the mayor's home is located. There were about 10 officers at each of the four intersections and about 10 officers spread along each of the four blocks. The rest of the 100 police officers assigned to the march accompanied the demonstrators as they marched around the block. The police tried to keep all spectators across the street from the marchers. They were equipped with walkie-talkie radios to relay reports of conditions to each other and they had a bullhorn with which they addressed the spectators and the demonstrators.

"As the marchers started around the block the first time, the neighbors began coming out of their homes. On the second time around the block some of the residents had moved their lawn sprinklers onto the sidewalk and the demonstrators went into the street just long enough to get around the water. On the third trip around the block the water sprinklers had been removed, presumably by order of the police. Gregory himself testified to several instances when the police kept the crowd that was accumulating from interfering with the march. 'One of the neighborhood people stood in front of the line, and we just stopped. This individual didn't move and we didn't move. After a few minutes, the officer standing on the corner asked him to move and he moved.' He said that on their fourth trip around the block (about 8:30 P.M.) people were yelling out the windows and the police made spectators in door ways close the doors. About 8:30 P.M. the demonstrators quit their singing and chanting and marched quietly. Shortly before 9:00 P.M. 100 to 150 spectators formed a line of march ahead of the demonstrators. Gregory said 'the lieutenant [Hougeson] asked me if I would hold up the line until they got those people out of the way. I said, I will hold up the line, but they have just as much right to march peacefully as we have.' The spectators were ordered to move. In order to avoid the appearance that the marchers were following the 100 to 150 spectators who had been ordered to move, Gregory said his group marched straight south crossing 36th Street thus taking them one block south of the block which they had been marching. They had to stop when they crossed 36th Street while the police opened a pathway through about 300 spectators they had confined on the corner across the street.

"Sergeant Golden testified that between 8:00 o'clock and 9:00 o'clock the crowd increased steadily to a few hundred, but that from 9:00 o'clock until about 9:20 o'clock the people just seemed to come from everywhere until it reached between 1,000 and 1,200. During this time the crowd became unruly. There was shouting and threats. 'God damned nigger, get the hell out of here;' 'Get out of here niggers—go back where you belong or we will get you out of here' and 'Get the hell out of here or we will break your blankety-blank head open.' Cars were stopped in the streets with their horns blowing. There were Ku Klux Klan signs and there was singing of the Alabama Trooper song. Children in the crowd were playing various musical instruments such as a cymbal, trumpet and drum.

"Rocks and eggs were also being thrown at the marchers from the crowd. The police were dodging the rocks and eggs and attempted to catch the persons who threw them. Sergeant Golden explained the problem. 'You could see these teen-agers behind the crowd. You could see a boil of activity and something would come over our heads and I or my partner would go down to try to apprehend who was doing it. You couldn't see who was doing it. They would vanish into the crowd.' He further testified that about 9:25 P.M., 'They were saying, "Let's get them," and with this they would step off the curb to try to cross 35th Street and we would push them back with force. Once in a while somebody would run out, and we would grab ahold of them and throw them back into the crowd.'

"About 9:30 P.M. Commander Pierson told Gregory the situation was dangerous and becoming riotous. He asked Gregory if he would co-operate and lead the marchers out of the area. The request to leave the area was made about five times. Pierson then told the marchers that any of them who wished to leave the area would be given a police escort. Three of the marchers accepted the proposal and were escorted out of the area. The remaining demonstrators were arrested and taken away in two police vans.

"While we have gone into considerable detail in describing the events leading to the arrest of defendants, only a complete reading of the record can give one a true picture of the dilemma confronting the police. During the entire march from 4:30 P.M. until 9:30 P.M. the marchers were accompanied by their attorney who advised them, and the police were accompanied by an assistant city attorney who advised them. In short the record shows a determined effort by the police to allow the marchers to peacefully demonstrate and at the same time maintain order."

MR. JUSTICE HARLAN, concurring in the result.

Two factors in this case run afoul of well-established constitutional principles, and clearly call for reversal. These are the ambulatory sweep of the Chicago disorderly conduct ordinance, see, *e. g., Cantwell* v. *Connecticut,* 310 U. S. 296 (1940), and *Garner* v. *Louisiana,* 368 U. S. 157, 186 (1961) (HARLAN, J., concurring in judgment), and the possibility that as the case went to the jury the convictions may have rested on a constitutionally impermissible ground. See *Stromberg* v. *California,* 283 U. S. 359 (1931).

I agree with the concurring opinion of my Brother BLACK on both of these scores, and to that extent join in it.

CITIZEN PUBLISHING CO. ET AL. *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

No. 243. Argued January 15, 1969.—Decided March 10, 1969.

In 1940 the only two daily newspapers in Tucson, the Citizen, an evening paper, and the Star, a daily and Sunday paper, negotiated a joint operating agreement, which was to run for 25 years. Prior thereto the papers had been vigorous competitors. The agreement provided that each paper was to retain its news and editorial departments and corporate identity, but that generally business operations were to be integrated. Three types of controls were imposed: (1) price-fixing—papers were to be distributed and advertising sold by a jointly held company, and subscription and advertising rates were to be set jointly; (2) profit pooling—all profits were to be pooled and distributed under an agreed ratio; and (3) market control—neither paper nor any of their stockholders or officers were to engage in any other business in the county in conflict with the agreement. In 1953 the agreement was extended until 1990. Combined profits before taxes rose from $27,531 in 1940 to $1,727,217 in 1964. In 1965 the Star's stock was acquired by Citizen's shareholders pursuant to an option in the agreement, and the Star is now published by a company formed as a vehicle for the acquisition. The Government charged appellants with unreasonable restraint of trade in violation of § 1 of the Sherman Act, monopolization in violation of § 2 of that Act, and violation of § 7 of the Clayton Act by the acquisition of the Star stock. The District Court found that the agreement contained provisions unlawful *per se* under § 1 of the Sherman Act and granted the Government's motion for summary judgment. The case was tried on the other charges and the court found monopolization of the newspaper business in Tucson in violation of § 2 of the Act, and held that, in Pima County, the appropriate geographic market, acquisition of the Star caused a substantial lessening of competition in daily newspaper publishing in violation of § 7 of the Clayton Act. The decree requires appellants to submit a plan for divestiture of the Star and its re-establishment as an independent competitor and to modify the joint operating agreement to eliminate price-fixing, market control, and profit-pooling provisions. *Held:*

1. The violations of § 1 of the Sherman Act are plain, as price-fixing is illegal *per se,* pooling of profits pursuant to an inflexible ratio reduces incentives to compete, and the agreement not to engage in any other publishing business in Pima County is a division of fields proscribed by the Act. Pp. 135–136.

2. The requirements of the failing company doctrine were not met. Pp. 136–139.

(a) There is no indication that the Citizen's owners were thinking of liquidating the company or selling the newspaper, and there is no evidence that the agreement was the last straw at which the Citizen grasped. Pp. 137–138.

(b) The failing company doctrine can be applied only if it is established that the acquiring company is the only available purchaser. P. 138.

(c) The prospects for the failing company of reorganization through receivership or through Chapter X or Chapter XI of the Bankruptcy Act would have to be dim or nonexistent to make the failing company doctrine applicable. P. 138.

(d) The burden of proving that the requirements of the doctrine are met is on those who seek refuge under it, and that burden has not been satisfied here. Pp. 138–139.

3. The decree deals only with private restraints on business competition and does not regulate news gathering or dissemination in derogation of First Amendment rights. *Associated Press* v. *United States,* 326 U. S. 1. Pp. 139–140.

280 F. Supp. 978, affirmed.

Richard J. MacLaury argued the cause for appellants. With him on the briefs were *Francis N. Marshall, Thomas J. Klitgaard, John L. Donahue, Jr.,* and *George Read Carlock.*

Daniel M. Friedman argued the cause for the United States. On the brief were *Attorney General Clark, Solicitor General Griswold, Assistant Attorney General Zimmerman, Howard E. Shapiro, Charles D. Mahaffie, Jr.,* and *Gerald A. Connell.*

Briefs of *amici curiae* urging reversal were filed by *Arthur B. Hanson* for the American Newspaper Publishers Assn., and by *Robert L. Stern* for a number of newspaper publishers.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Tucson, Arizona, has only two daily newspapers of general circulation, the Star and the Citizen. The Citizen is the oldest, having been founded before 1900, and is an evening paper published six times a week. The Star, slightly younger than the Citizen, has a Sunday as well as a daily issue. Prior to 1940 the two papers vigorously competed with each other. While their circulation was about equal, the Star sold 50% more advertising space than the Citizen and operated at a profit, while the Citizen sustained losses. Indeed the Star's annual profits averaged about $25,825, while the Citizen's annual losses averaged about $23,550.

In 1936 the stock of the Citizen was purchased by one Small and one Johnson for $100,000 and they invested an additional $25,000 of working capital. They sought to interest others to invest in the Citizen but were not successful. Small increased his investment in the Citizen, moved from Chicago to Tucson, and was prepared to finance the Citizen's losses for at least awhile from his own resources. It does not appear that Small and Johnson sought to sell the Citizen; nor was the Citizen about to go out of business. The owners did, however, negotiate a joint operating agreement between the two papers which was to run for 25 years from March 1940, a term that was extended in 1953 until 1990. By its terms the agreement may be canceled only by mutual consent of the parties.

The agreement provided that each paper should retain its own news and editorial department, as well as its corporate identity. It provided for the formation of Tucson Newspapers, Inc. (TNI), which was to be owned in equal shares by the Star and Citizen and which was to manage all departments of their business except the news and editorial units. The production and distribution equipment of each paper was transferred to TNI. The latter had five directors—two named by the Star, two by the Citizen, and the fifth chosen by the Citizen out of three named by the Star.

The purpose of the agreement was to end any business or commercial competition between the two papers and to that end three types of controls were imposed. First was *price fixing*. The newspapers were sold and distributed by the circulation department of TNI; commercial advertising placed in the papers was sold only by the advertising department of TNI; the subscription and advertising rates were set jointly. Second was *profit pooling*. All profits realized were pooled and distributed to the Star and the Citizen by TNI pursuant to an agreed ratio. Third was a *market control*. It was agreed that neither the Star nor the Citizen nor any of their stockholders, officers, and executives would engage in any other business in Pima County—the metropolitan area of Tucson—in conflict with the agreement. Thus competing publishing operations were foreclosed.

All commercial rivalry between the papers ceased. Combined profits before taxes rose from $27,531 in 1940 to $1,727,217 in 1964.

The Government's complaint charged an unreasonable restraint of trade or commerce in violation of § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, and a monopoly in violation of § 2, 15 U. S. C. § 2. The District Court, after finding that the joint operating agreement contained provisions which were unlawful *per se* under § 1, granted the Government's motion for summary judgment.

The case went to trial on the § 2 charge and also on a charge brought under § 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 18.[1] The latter charge

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[1] Section 7 provides in part:

"[N]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share arose out of the acquisition of the stock of the Star by the shareholders of the Citizen pursuant to an option in the joint operating agreement. Arden Publishing Company was formed as the vehicle of acquisition and it now publishes the Star.

At the end of the trial the District Court found that the joint operating agreement in purpose and effect monopolized the only newspaper business in Tucson in violation of § 2 of the Sherman Act.

As respects the Clayton Act charge the District Court found that in Pima County, the appropriate geographic market, the Citizen's acquisition of the Star stock had the effect of continuing in a more permanent form a substantial lessening of competition in daily newspaper publishing that is condemned by § 7.

The decree does not prevent all forms of joint operation. It requires, however, appellants to submit a plan for divestiture and re-establishment of the Star as an independent competitor and for modification of the joint operating agreement so as to eliminate the price-fixing, market control, and profit-pooling provisions. 280 F. Supp. 978. The case is here by way of appeal. Expediting Act, § 2, 32 Stat. 823, as amended, 15 U. S. C. § 29.

We affirm the judgment. The § 1 violations are plain beyond peradventure. Price-fixing is illegal *per se*. *United States* v. *Masonite Corp.*, 316 U. S. 265, 276. Pooling of profits pursuant to an inflexible ratio at least reduces incentives to compete for circulation and advertising revenues and runs afoul of the Sherman Act. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 328. The agreement not to engage in any other publishing business in Pima County was a division of fields also banned by the Act. *Timken Co.* v. *United States*,

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capital . . . of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

341 U. S. 593. The joint operating agreement exposed the restraints so clearly and unambiguously as to justify the rather rare use of a summary judgment in the antitrust field. See *Northern Pac. R. Co.* v. *United States*, 356 U. S. 1, 5.

The only real defense of appellants was the "failing company" defense—a judicially created doctrine.[2] The facts tendered were excluded on the § 1 charge but were admitted on the § 2 charge as well as on the § 7 charge under the Clayton Act. So whether or not the District Court was correct in excluding the evidence under the § 1 charge, it is now before us; and a consideration of it makes plain that the requirements of the failing company doctrine were not met. That defense was before the Court in *International Shoe Co.* v. *FTC*, 280 U. S. 291, where § 7 of the Clayton Act was in issue.[3] The evidence showed that the resources of one company were so depleted and the prospect of rehabilitation so remote that "it faced the grave probability of a business failure." 280 U. S., at 302. There was, moreover, "no other prospective purchaser." *Ibid.* It was in that setting that the Court held that the acquisition of that company by another did not substantially lessen competition within the meaning of § 7. 280 U. S., at 302–303.

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[2] See Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 339 (1960); Hale & Hale, Failing Firms and the Merger Provisions of the Antitrust Laws, 52 Ky. L. J. 597, 607 (1964); Connor, Section 7 of the Clayton Act: The "Failing Company" Myth, 49 Geo. L. J. 84, 96 (1960).

The failing company doctrine was held to justify mergers in *United States* v. *Maryland & Virginia Milk Producers Assn.*, 167 F. Supp. 799, aff'd, 362 U. S. 458, and in *Union Leader Corp.* v. *Newspapers of New England*, 284 F. 2d 582.

For cases where the failing company doctrine was not allowed as a defense see *United States* v. *Diebold, Inc.*, 369 U. S. 654; *United States* v. *El Paso Gas Co.*, 376 U. S. 651; *United States* v. *Von's Grocery Co.*, 384 U. S. 270; *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 372, n. 46; *United States* v. *Third National Bank*, 390 U. S. 171.

[3] It should be noted that at the time the *International Shoe Co.* case was decided § 7 of the Clayton Act provided: "[N]o corporation . . . shall acquire . . . stock or other share capital of another corporation . . . where the effect of such acquisition may be to substantially lessen competition *between the corporation whose stock is so acquired and the corporation making the acquisition* . . . ." (Emphasis supplied.) Consequently, where the acquired company was "such as to necessitate liquidation," and where "the prospect for

In the present case the District Court found:

> "At the time Star Publishing and Citizen Publishing entered into the operating agreement, and at the time the agreement became effective, Citizen Publishing was not then on the verge of going out of business, nor was there a serious probability at that time that Citizen Publishing would terminate its business and liquidate its assets unless Star Publishing and Citizen Publishing entered into the operating agreement." 280 F. Supp., at 980.

The evidence sustains that finding. There is no indication that the owners of the Citizen were contemplating a liquidation. They never sought to sell the Citizen and there is no evidence that the joint operating agreement was the last straw at which the Citizen grasped. Indeed the Citizen continued to be a significant threat to the Star. How otherwise is one to explain the Star's willingness to enter into an agreement to share its profits

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future competition . . . was entirely eliminated," it may have been reasonable to conclude that there was no more existing competition between the companies to be lessened by acquisition. 280 U. S., at 294. In 1950, however, § 7 was amended to make the measure of anticompetitive acquisitions the extent to which they lessened competition "in any line of commerce," rather than the extent to which they lessened competition "between" the two companies.

We have no occasion, however, to determine what changes, if any, that amendment had on the failing company doctrine.

with the Citizen? Would that be true if as now claimed the Citizen was on the brink of collapse?

The failing company doctrine plainly cannot be applied in a merger or in any other case unless it is established that the company that acquires the failing company or brings it under dominion is the only available purchaser. For if another person or group could be interested, a unit in the competitive system would be preserved and not lost to monopoly power. So even if we assume, *arguendo,* that in 1940 the then owners of the Citizen could not long keep the enterprise afloat, no effort was made to sell the Citizen; its properties and franchise were not put in the hands of a broker; and the record is silent on what the market, if any, for the Citizen might have been. Cf. *United States* v. *Diebold, Inc.,* 369 U. S. 654, 655.

Moreover, we know from the broad experience of the business community since 1930, the year when the *International Shoe* case was decided, that companies reorganized through receivership, or through Chapter X or Chapter XI of the Bankruptcy Act often emerged as strong competitive companies. The prospects of reorganization of the Citizen in 1940 would have had to be dim or nonexistent to make the failing company doctrine applicable to this case.

The burden of proving that the conditions of the failing company doctrine [4] have been satisfied is on those who seek refuge under it. That burden has not been satisfied in this case.

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[4] Bills were introduced both in the 90th Congress (S. 1312 by Senator Hayden and H. R. 19123 by Mr. Edmondson) and in the 91st Congress (H. R. 279 by Mr. Matsunaga and H. R. 5199 by Mr. Johnson) to exempt from the antitrust laws joint operating agreements between newspapers because of economic distress. Extensive hearings were held in 1967 and 1968. See Hearings on S. 1312 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., pts. 1–6; Hearings on H. R. 19123 and Related Bills before the Antitrust Subcommittee of the House Committee on the Judiciary, 90th Cong.,

We confine the failing company doctrine to its present narrow scope.

The restraints imposed by these private arrangements have no support from the First Amendment as *Associated Press* v. *United States,* 326 U. S. 1, 20, teaches.

Neither news gathering nor news dissemination is being regulated by the present decree. It deals only with restraints on certain business or commercial practices. The restraints on competition with which the present decree deals comport neither with the antitrust laws nor with the First Amendment. As we stated in the *Associated Press* case:

> "It would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination

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2d Sess., ser. 25. The hearings reflect all shades of opinion. As stated by the House Subcommittee:

"The antitrust laws embody concepts and principles which long have been considered to be the bedrock of our economic institutions. Piecemeal exemptions from the antitrust laws to cope with problems of particular industries have been given reluctantly and only after there has been a clear showing of overriding need." Hearings, *supra,* ser. 25, p. 2. See Roberts, Antitrust Problems in the Newspaper Industry, 82 Harv. L. Rev. 319, 344–352 (1968); Flynn, Antitrust and the Newspapers, A Comment on S. 1312, 22 Vand. L. Rev. 103 (1968).

As of this date Congress has taken no action on any of those bills.

> of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity." 326 U. S., at 20.

The other points mentioned are too trivial for discussion. Divestiture of the Star seems to us quite proper. At least there is no showing of that abuse of discretion which authorizes us to recast the decree. See *United States* v. *Crescent Amusement Co.,* 323 U. S. 173, 185.

Affirmed.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN, concurring in the result.

When the owners of the Citizen and the Star embarked upon their joint venture in 1940, they did not believe that they were combining their commercial operations for all time. Rather, their contract provided that the venture would last for 25 years and that the relationship would terminate in 1965 if both parties agreed to go their separate ways. It was only in 1953 that the parties agreed they would not permit their contract to expire in 1965 but would continue their relationship for another quarter century beyond the original termination date.

Nevertheless, both the Department of Justice and my Brethren have decided that the crucial question in this case is whether the original 1940 transaction could be justified on "failing company" grounds. Yet regardless of one's view of the 1940 transaction, the fact remains that if the parties had not renewed their agreement, full competition between the two newspapers would have been restored in 1965 and the Justice Department would never have begun the Sherman Act branch of this lawsuit. It would appear, then, that the decisive issue in this case is not the validity of the original 1940 transaction but the propriety of the decision taken in 1953 in which the term of the joint venture was extended by a quarter century beyond its original termination date.

In defense of the Court's approach, one may argue that if the 1940 agreement had provided that the newspapers' joint venture was to continue indefinitely, we would then have been required to decide this case on the basis of the situation prevailing at the time of the original transaction. In other words, if the agreement had been only slightly different it is arguable that we would have had no choice but to treat the transaction in the same way we would treat a total corporate merger. However this may be, I do not understand why the parties' decision to retain the advantages of flexibility should not be decisive for our purposes. If businessmen believe, after considering all the relevant factors, that future events may deprive their existing arrangements of utility, there is no reason why the antitrust laws should not view the transaction in a similar way.

While the trial court did not analyze the case in the way which I have suggested, it made sufficient factual findings to permit an evaluation of the legality of the 1953 decision extending the joint venture's term. The Court in effect found that in each year between 1940 and 1953, each newspaper operated at a profit. Moreover, in the decade preceding 1953, the joint venture's total profits increased with each succeeding year. Given this pattern of increasing profitability, I would hold that the "failing company" doctrine could not reasonably permit the two newspapers to extend the term of the agreement in 1953 at a time when it was impossible to predict whether full competition could be renewed in 1965.

Nor can the newspapers appropriately invoke the "failing company" defense to justify another quarter century's joint operation on the basis of the financial situation which actually existed in 1965. For the trial judge found that the joint venture's profits had continued their upward spiral with each year, reaching $1,727,217 in 1964, and that both the newspapers are now "in sound financial condition." 280 F. Supp. 978, 983. Moreover, in the quarter century since 1940, the number of households in the Tucson area has almost quadrupled, see Government's Exhibit 55, App. 452, and total circulation of the Star and the Citizen has increased proportionately. See Government's Exhibit 49, App. 448–450. While the District Court found it "impossible to predict" how well the two papers could compete without their present agreement, 280 F. Supp., at 993, I would hold that the joint venture's profitability required the companies to make a conscientious effort to operate independently before they could properly contend that their operating agreement was a business necessity.

Consequently, although I join in the Court's judgment in this case, I find it unnecessary to define the circumstances in which a declining newspaper may properly act to assure its future independence as a news medium by entering into a joint operating agreement similar to the one challenged here.

MR. JUSTICE STEWART, dissenting.

Prior decisions of this Court have made it clear that a failing company cannot combine with a competitor if its independence could be preserved by sale to an outsider.[1] Today's decision for the first time lays down the blanket rule that the failing company defense is forfeited by a company which cannot show that it made substantial affirmative efforts to sell to a noncompetitor. That precise quantum and quality of proof may be a reasonable and effective prophylactic standard to ensure that the company could truly not have been sold. But proof of unsuccessful efforts to sell the company is not, as a logical, evidentiary matter, the only possible conclusive proof that it was not marketable. In many cases other evidence might make equally clear that any such efforts would surely have been fruitless. The Court's new rule, in other words, has validity only as a standard imposed on future conduct and not as an unrebuttable evidentiary presumption with respect to past events. Therefore, the inflexible enforcement of that rule should be limited to those who—unlike the appellants—were on notice of their obligation to be able to prove that they made tangible efforts, however futile, to find an outside buyer.

It cannot be said that the appellants in the District Court did not adduce convincing evidence that the Citizen was failing so woefully that no outsider would have considered purchasing it. On the contrary, they introfinance the losses of Citizen Publishing for some little time thereafter from resources available to him other than the earnings or assets of Citizen Publishing." *Id.*, at 980.

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[1] *International Shoe Co.* v. *FTC,* 280 U. S. 291; *United States* v. *Diebold, Inc.,* 369 U. S. 654. Cf. *United States* v. *Third National Bank,* 390 U. S. 171, 190–192.

As stated above, the District Judge mistakenly thought that the failing company defense was unavailable in a case like this under § 1 of the Sherman Act. But he made clear his view that, if the failing company defense had been available—as in a total merger, for example—that defense would have prevailed:

> "Mr. MACLAURY: Well, would Your Honor then think if they had dissolved Star or Citizen or both and simply merged them all into one company, then the failing company doctrine would apply?
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> . . . . .
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> "The COURT: I think if Star acquired all of Citizen's assets and gave stock to the owners of Citizen, it probably would. *I would say that the Government wouldn't have much chance in this particular case of attacking that acquisition."* (Emphasis supplied.)

Because the question whether Citizen was a failing company has not yet been properly determined, I would vacate the judgment and remand the case to the District Court, so that this dispositive question may be fully canvassed.

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stockholders. Star Publishing from 1932 to 1940 operated at a profit.

. . . . .

"15. For many years prior to 1940, Citizen Publishing had been unable to pay a dividend. Prior to 1940, Mr. Small, Sr., received no salary and by March, 1940, Citizen Publishing owed debts of more than $109,000. Of this indebtedness, about $79,000 was to stockholders of Citizen Publishing."

SHUTTLESWORTH *v.* CITY OF BIRMINGHAM.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 42. Argued November 18, 1968.—Decided March 10, 1969.

Petitioner, a Negro minister who helped lead 52 Negroes in an orderly civil rights march in Birmingham, Ala., in 1963, was arrested and convicted for violating § 1159 of the city's General Code, an ordinance which proscribes participating in any parade or procession on city streets or public ways without first obtaining a permit from the City Commission. Section 1159 permits the Commission to refuse a parade permit if its members believe "the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused." Petitioner had previously been given to understand by a member of the Commission that under no circumstances would petitioner and his group be allowed to demonstrate in Birmingham. The Alabama Court of Appeals reversed the conviction on the grounds, *inter alia,* that § 1159, as written, unconstitutionally imposed an "invidious prior restraint" without ascertainable standards for the granting of permits, and that the ordinance had been discriminatorily enforced. However, the Alabama Supreme Court in 1967 narrowly construed § 1159 as an objective, even-handed traffic regulation which did not allow the Commission unlimited discretion in granting or withholding permits, and upheld petitioner's conviction. *Held:*

1. A law subjecting the right of free expression in publicly owned places to the prior restraint of a license, without narrow, objective, and definite standards is unconstitutional, and a person faced with such a law may ignore it and exercise his First Amendment rights. Pp. 150–151.

2. Picketing and parading may constitute methods of expression entitled to First Amendment protection, and use of the streets for that purpose, though subject to regulation, may not be wholly denied. P. 152.

3. Since the terms of § 1159 gave the Commission unbridled authority to issue or withhold parade permits without reference to legitimate regulation of public streets and sidewalks, the ordinance would be, absent a limiting construction, unconstitutional on its face. Pp. 150–151, 153.

4. The narrow construction that the State Supreme Court placed upon § 1159 in 1967 does not necessarily validate petitioner's 1963 conviction; the test is whether the ordinance was actually administered "so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." *Cox* v. *New Hampshire,* 312 U. S. 569, 574. Pp. 153–155.

5. Since in this case § 1159 was administered in accordance with its impermissibly broad language, so as to "deny or unwarrantedly abridge" the First Amendment rights of the petitioner and his organization, the petitioner's conviction may not stand. *Cox* v. *New Hampshire, supra,* distinguished. Pp. 155–159.

281 Ala. 542, 206 So. 2d 348, reversed.

Jack Greenberg argued the cause for petitioner. With him on the brief were *James M. Nabrit III, Norman C. Amaker, Charles Stephen Ralston, Melvyn Zarr, Arthur D. Shores, Orzell Billingsley, Jr.,* and *Anthony G. Amsterdam.*

Earl McBee argued the cause for respondent. With him on the brief were *J. M. Breckenridge* and *William C. Walker.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner stands convicted for violating an ordinance of Birmingham, Alabama, making it an offense to participate in any "parade or procession or other public demonstration" without first obtaining a permit from the City Commission. The question before us is whether that conviction can be squared with the Constitution of the United States.

On the afternoon of April 12, Good Friday, 1963, 52 people, all Negroes, were led out of a Birmingham church by three Negro ministers, one of whom was the petitioner, Fred L. Shuttlesworth. They walked in orderly fashion, two abreast for the most part, for four blocks. The purpose of their march was to protest the alleged denial of civil rights to Negroes in the city of Birmingham. The marchers stayed on the sidewalks except at street intersections, and they did not interfere with other pedestrians. No automobiles were obstructed, nor were traffic signals disobeyed. The petitioner was with the group for at least part of this time, walking alongside the others, and once moving from the front to the rear. As the marchers moved along, a crowd of spectators fell in behind them at a distance. The spectators at some points spilled out into the street, but the street was not blocked and vehicles were not obstructed.

At the end of four blocks the marchers were stopped by the Birmingham police, and were arrested for violating § 1159 of the General Code of Birmingham. That ordinance reads as follows:

> "It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission.
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> "To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be

> refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.
>
> "The two preceding paragraphs, however, shall not apply to funeral processions."

The petitioner was convicted for violation of § 1159 and was sentenced to 90 days' imprisonment at hard labor and an additional 48 days at hard labor in default of payment of a $75 fine and $24 costs. The Alabama Court of Appeals reversed the judgment of conviction, holding the evidence was insufficient "to show a procession which would require, under the terms of § 1159, the getting of a permit," that the ordinance had been applied in a discriminatory fashion, and that it was unconstitutional in imposing an "invidious prior restraint" without ascertainable standards for the granting of permits. 43 Ala. App. 68, —, —, 180 So. 2d 114, 139, 127. The Supreme Court of Alabama, however, giving the language of § 1159 an extraordinarily narrow construction, reversed the judgment of the Court of Appeals and reinstated the conviction. 281 Ala. 542, 206 So. 2d 348. We granted certiorari to consider the petitioner's constitutional claims. 390 U. S. 1023.

There can be no doubt that the Birmingham ordinance, as it was written, conferred upon the City Commission virtually unbridled and absolute power to prohibit any "parade," "procession,"[1] or "demonstration" on the city's streets or public ways. For in deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of "public welfare, peace, safety, health, decency, good order, morals or convenience." This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.[2] "It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Staub* v. *Baxley,* 355 U. S. 313, 322. And our decisions have made clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license.[3] "The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands." *Jones* v. *Opelika,* 316 U. S. 584, 602 (Stone, C. J., dissenting), adopted *per curiam* on rehearing, 319 U. S. 103, 104.

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[1] Except funeral processions.

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[2] See *Lovell* v. *Griffin,* 303 U. S. 444; *Hague* v. *C. I. O.,* 307 U. S. 496; *Schneider* v. *State,* 308 U. S. 147, 163–165; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Largent* v. *Texas,* 318 U. S. 418; *Jones* v. *Opelika,* 316 U. S. 584, 600 (Stone, C. J., dissenting), 611 (Murphy, J., dissenting), vacated and previous dissenting opinions adopted *per curiam,* 319 U. S. 103; *Marsh* v. *Alabama,* 326 U. S. 501; *Tucker* v. *Texas,* 326 U. S. 517; *Saia* v. *New York,* 334 U. S. 558; *Kunz* v. *New York,* 340 U. S. 290; *Niemotko* v. *Maryland,* 340 U. S. 268; *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495; *Gelling* v. *Texas,* 343 U. S. 960; *Superior Films, Inc.* v. *Department of Education,* 346 U. S. 587; *Staub* v. *Baxley,* 355 U. S. 313; *Cox* v. *Louisiana,* 379 U. S. 536; *Interstate Circuit, Inc.* v. *Dallas,* 390 U. S. 676.

[3] *Lovell* v. *Griffin,* 303 U. S., at 452–453; *Schneider* v. *State,* 308 U. S., at 159, 165; *Largent* v. *Texas,* 318 U. S., at 419, 422; *Jones* v. *Opelika,* 316 U. S., at 602 (Stone, C. J., dissenting), adopted *per curiam* on rehearing, 319 U. S., at 104; *Staub* v. *Baxley,* 355 U. S., at 319; *Freedman* v. *Maryland,* 380 U. S. 51, 56–57.

It is argued, however, that what was involved here was not "pure speech," but the use of public streets and sidewalks, over which a municipality must rightfully exercise a great deal of control in the interest of traffic regulation and public safety. That, of course, is true. We have emphasized before this that "the First and Fourteenth Amendments [do not] afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech." *Cox* v. *Louisiana,* 379 U. S. 536, 555. "Governmental authorities have the duty and responsibility to keep their streets open and available for movement." *Id.,* at 554–555.

But our decisions have also made clear that picketing and parading may nonetheless constitute methods of expression, entitled to First Amendment protection. *Cox* v. *Louisiana, supra; Edwards* v. *South Carolina,* 372 U. S. 229; *Thornhill* v. *Alabama,* 310 U. S. 88. "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied." *Hague* v. *C. I. O.,* 307 U. S. 496, 515–516 (opinion of Mr. Justice Roberts, joined by MR. JUSTICE BLACK).

Accordingly, "[a]lthough this Court has recognized that a statute may be enacted which prevents serious interference with normal usage of streets and parks, . . . we have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places." *Kunz* v. *New York,* 340 U. S. 290, 293–294. See also *Saia* v. *New York,* 334 U. S. 558; *Niemotko* v. *Maryland,* 340 U. S. 268. Even when the use of its public streets and sidewalks is involved, therefore, a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question on the "welfare," "decency," or "morals" of the community.

Understandably, under these settled principles, the Alabama Court of Appeals was unable to reach any conclusion other than that § 1159 was unconstitutional. The terms of the Birmingham ordinance clearly gave the City Commission extensive authority to issue or refuse to issue parade permits on the basis of broad criteria entirely unrelated to legitimate municipal regulation of the public streets and sidewalks.

It is said, however, that no matter how constitutionally invalid the Birmingham ordinance may have been as it was written, nonetheless the authoritative construction that has now been given it by the Supreme Court of Alabama has so modified and narrowed its terms as to render it constitutionally acceptable. It is true that in affirming the petitioner's conviction in the present case, the Supreme Court of Alabama performed a remarkable job of plastic surgery upon the face of the ordinance. The court stated that when § 1159 provided that the City Commission could withhold a permit whenever "in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require," the ordinance really meant something quite different:

> "[W]e do not construe this [language] as vesting in the Commission an unfettered discretion in granting or denying permits, but, in view of the purpose of the ordinance, one to be exercised in connection with the safety, comfort and convenience in the use of the streets by the general public. . . . The members of the Commission may not act as censors of what is to be said or displayed in any parade. . . .
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> * * * * *
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> ". . . [We] do not construe § 1159 as conferring upon the 'commission' of the City of Birmingham the right to refuse an application for a permit to carry on a parade, procession or other public demonstration solely on the ground that such activities might tend to provoke disorderly conduct. . . .
>
> "We also hold that under § 1159 the Commission is without authority to act in an arbitrary manner or with unfettered discretion in regard to the issuance of permits. Its discretion must be exercised with uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination. A systematic, consistent and just order of treatment with reference to the convenience of public use of the streets and sidewalks must be followed. Applications for permits to parade must be granted if, after an investigation it is found that the convenience of the public in the use of the streets or sidewalks would not thereby be unduly disturbed." 281 Ala., at 545–546, 206 So. 2d, at 350–352.

In transforming § 1159 into an ordinance authorizing no more than the objective and even-handed regulation of traffic on Birmingham's streets and public ways, the Supreme Court of Alabama made a commendable effort to give the legislation "a field of operation within constitutional limits." 281 Ala., at 544, 206 So. 2d, at 350. We may assume that this exercise was successful, and that the ordinance as now authoritatively construed would pass constitutional muster.[4] It does not follow, however, that the severely narrowing construction put upon the ordinance by the Alabama Supreme Court in November of 1967 necessarily serves to restore constitutional validity to a conviction that occurred in 1963 under the ordinance as it was written. The inquiry in every case must be that stated by Chief Justice Hughes in *Cox* v. *New Hampshire,* 312 U. S. 569—whether control of the use of the streets for a parade or procession was, in fact, "exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." *Id.,* at 574.

In *Cox* the Court found that control of the streets had not been exerted unconstitutionally. There the Court was dealing with a parade-permit statute that was silent as to the criteria governing the granting of permits. In affirming the appellants' convictions for parading without a permit, the New Hampshire Supreme Court had construed the statute to require the issuance of a permit to anybody who applied, subject only to the power of the licensing authority to specify the "time, place and manner" of the parade in order to accommodate competing demands for public use of the streets. This Court accepted the state court's characterization of the statute, and its assurance that the appellants " 'had a right, under the Act, to a license to march when, where and as they did, if after a required investigation it was found that the convenience of the public in the use of the streets would not thereby be unduly disturbed, upon such conditions or changes in time, place and manner as would avoid disturbance.' " 312 U. S., at 576. In affirming the New Hampshire judgment, however, this Court was careful to emphasize:

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[4] The validity of this assumption would depend upon, among other things, the availability of expeditious judicial review of the Commission's refusal of a permit. Cf. *Poulos* v. *New Hampshire,* 345 U. S. 395, 420 (Frankfurter, J., concurring in result); *Freedman* v. *Maryland,* 380 U. S. 51. See also the concurring opinion of MR. JUSTICE HARLAN, *post,* p. 159.

> "There is no evidence that the statute has been administered otherwise than in the fair and nondiscriminatory manner which the state court has construed it to require." *Id.*, at 577.

In the present case we are confronted with quite a different situation. In April of 1963 the ordinance that was on the books in Birmingham contained language that affirmatively conferred upon the members of the Commission absolute power to refuse a parade permit whenever they thought "the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused." It would have taken extraordinary clairvoyance for anyone to perceive that this language meant what the Supreme Court of Alabama was destined to find that it meant more than four years later; and, with First Amendment rights hanging in the balance, we would hesitate long before assuming that either the members of the Commission or the petitioner possessed any such clairvoyance at the time of the Good Friday march.

But we need not deal in assumptions. For, as the respondent in this case has reminded us, in assessing the constitutional claims of the petitioner, "[i]t is less than realistic to ignore the surrounding relevant circumstances.

These include not only facts developed in the Record in this case, but also those shown in the opinions in the related case of *Walker* v. *City of Birmingham* (1967), 388 U. S. 307 . . . ."[5] The petitioner here was one of the petitioners in the *Walker* case, in which, just two Terms ago, we had before us a record showing many of the "surrounding relevant circumstances" of the Good Friday march. As the respondent suggests, we may properly take judicial notice of the record in that litigation between the same parties who are now before us.[6]

Uncontradicted testimony was offered in *Walker* to show that over a week before the Good Friday march petitioner Shuttlesworth sent a representative to apply for a parade permit. She went to the City Hall and asked "to see the person or persons in charge to issue permits, permits for parading, picketing, and demonstrating." She was directed to Commissioner Connor, who denied her request in no uncertain terms. "He said, 'No, you will not get a permit in Birmingham, Alabama to picket. I will picket you over to the City Jail,' and he repeated that twice." 388 U. S., at 317, n. 9, 325, 335, 339.

Two days later petitioner Shuttlesworth himself sent a telegram to Commissioner Connor requesting, on behalf of his organization, a permit to picket "against the injustices of segregation and discrimination." His request specified the sidewalks where the picketing would take place, and stated that "the normal rules of picketing" would be obeyed. In reply, the Commissioner sent a wire stating that permits were the responsibility of the entire Commission rather than of a single Commissioner, and closing with the blunt admonition: "I insist that you and your people do not start any picketing on the streets in Birmingham, Alabama." *Id.*, at 318, n. 10, 325, 335–336, 339–340.[7]

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[5] Brief for Respondent 1–2.

[6] *National Fire Ins. Co.* v. *Thompson*, 281 U. S. 331, 336, and cases cited therein.

These "surrounding relevant circumstances" make it indisputably clear, we think, that in April of 1963—at least with respect to this petitioner and his organization[8]—the city authorities thought the ordinance meant exactly what it said. The petitioner was clearly given to understand that under no circumstances would he and his group be permitted to demonstrate in Birmingham, not that a demonstration would be approved if a time and place were selected that would minimize traffic problems. There is no indication whatever that the authorities considered themselves obligated—as the Alabama Supreme Court more than four years later said that they were—to issue a permit "if, after an investigation [they] found that the convenience of the public in the use of the streets or sidewalks would not thereby be unduly disturbed."

This case, therefore, is a far cry from *Cox* v. *New Hampshire, supra,* where it could be said that there was nothing to show "that the statute has been administered otherwise than in the . . . manner which the state court has construed it to require." Here, by contrast, it is evident that the ordinance was administered so as, in the words of Chief Justice Hughes, "to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought . . . immemorially associated with resort to public places." The judgment is

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[7] The legal and constitutional issues involved in the *Walker* case were quite different from those involved here. The Court recently summarized the *Walker* decision as follows:

"In that case, the Court held that demonstrators who had proceeded with their protest march in face of the prohibition of an injunctive order against such a march, could not defend contempt charges by asserting the unconstitutionality of the injunction. The proper procedure, it was held, was to seek judicial review of the injunction and not to disobey it, no matter how well-founded their doubts might be as to its validity." *Carroll* v. *President and Commissioners of Princess Anne,* 393 U. S. 175, 179.

[8] In *Walker* the petitioner made an offer of proof that parade permits had been issued to other groups by the city clerk at the request of the traffic bureau of the police department. 388 U. S., at 325–326, 336, 340.

Reversed.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN, concurring.

The Alabama Supreme Court's opinion makes it clear that if petitioner Shuttlesworth had carried his efforts to obtain a parade permit to the highest state court, he could have required the city authorities to grant permission for his march, so long as his proposals were consistent with Birmingham's interest in traffic control. Thus, the difficult question this case presents is whether the Fourteenth Amendment ever bars a State from punishing a citizen for marching without a permit which could have been procured if all available remedies had been pursued.

The Court answers that a citizen is entitled to rely on the statutory construction adopted by the state officials who are on the front line, administering the permit scheme. If these officials construe a vague statute unconstitutionally, the citizen may take them at their word, and act on the assumption that the statute is void. The Court's holding seems to me to carry seeds of mischief that may impair the conceded ability of the authorities to regulate the use of public thoroughfares in the interests of all. The right to ignore a permit requirement should, in my view, be made to turn on something more substantial than a minor official's view of his authority under the governing statute.

Simply because an inferior state official indicates his view as to a statute's scope, it does not follow that the State's judiciary will come to the same conclusion. Situations do exist, however, in which there can be no effective review of the decision of an inferior state official. In the present case, for example, the decision of Commissioner Connor had the practical effect of the decision of a court of last resort. One week before the Good Friday march, Shuttlesworth learned from Connor that he, as Commissioner of Public Safety, would not issue parade permits, and that the marchers would have to apply to the entire City Commission.[1] But Birmingham's ordinances did not require a prompt decision by the City Commission.[2] Nor did the State of Alabama provide for a speedy court review of the denial of a parade permit.[3]

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[1] I agree with my Brother STEWART that we may properly take judicial notice of the evidence of record in *Walker* v. *Birmingham,* 388 U. S. 307 (1967). See 9 J. Wigmore, Evidence § 2579, at 570 (3d ed. 1940); *Butler* v. *Eaton,* 141 U. S. 240 (1891); *Craemer* v. *Washington,* 168 U. S. 124 (1897). That record shows that in response to a request for permission to march on April 5 and 6, Mr. Connor replied by telegram on April 5:

"Under the provisions of the city code of the City of Birmingham, a permit to picket as requested by you cannot be granted by me individually but is the responsiboity [*sic*] of the entire commission. I insist that you and your people do not start any picketing on the streets in Birmingham, Alabama.

"Eugene 'Bull' Connor, Commissioner of Public Safety."

See *Walker* v. *Birmingham,* No. 249, October Term, 1966, Transcript of Record 415. Mr. Connor's telegram was received in evidence at trial. See Transcript, *supra,* at 350.

I do not, however, find it appropriate to rely upon the slightly earlier episode detailed in my Brother STEWART's opinion, *ante,* at 157, as the trial judge ruled the uncontradicted supporting testimony inadmissible. See Transcript, *supra,* at 355.

Given the absence of speedy procedures, the Reverend Shuttlesworth and his associates were faced with a serious dilemma when they received their notice from Mr. Connor. If they attempted to exhaust the administrative and judicial remedies provided by Alabama law, it was almost certain that no effective relief could be obtained by Good Friday. Since the right to engage in peaceful and orderly political demonstrations is, under appropriate conditions, a fundamental aspect of the "liberty" protected by the Fourteenth Amendment, see *Stromberg* v. *California,* 283 U. S. 359, 368–370 (1931); *Hague* v. *C. I. O.,* 307 U. S. 496, 515–516 (1939) (opinion of Roberts, J.); *Garner* v. *Louisiana,* 368 U. S. 157, 201–203 (1961) (opinion of HARLAN, J.), the petitioner was not obliged to invoke procedures which could not give him effective relief. With fundamental rights at stake, he was entitled to adopt the more probable meaning of the ordinance and act on his belief that the city's permit regulations were unconstitutional.

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[2] Section 1159 does not require the City Commission to act on an application within any fixed amount of time. Indeed, by the time Connor definitively declared that he could not issue parade permits, it is not at all clear that petitioner could even have made a timely permit application to the City Commission at its only remaining regular session set before the scheduled Good Friday march. See General City Code of Birmingham § 21 (1944). While the 1964 City Code makes it clear that petitioner's permit application would have been considered out of time, see § 2–10, the 1944 Code, which was applicable in 1963, is not clear on this point.

[3] Although Shuttlesworth could have petitioned for a writ of mandamus in the Alabama Circuit Court if the City Commission denied his application, that state court is not obliged to render a decision within any fixed period of time.

It may be suggested, however, that Shuttlesworth's dilemma was of his own making. He could have requested a permit months in advance of Good Friday, thereby allowing Alabama's administrative and judicial machinery the necessary time to operate fully before the date set for the march. But such a suggestion ignores the principle established in *Freedman* v. *Maryland,* 380 U. S. 51, 58–61 (1965), which prohibits the States from requiring persons to invoke unduly cumbersome and time-consuming procedures before they may exercise their constitutional right of expression. *Freedman* holds that if the State is to protect the public from obscene movies, it must afford exhibitors a speedy administrative or judicial right of review, lest "the victorious exhibitor might find the most propitious opportunity for exhibition [passed]." *Id.,* at 61. The *Freedman* principle is applicable here.[4] The right to assemble peaceably to voice political protest is at least as basic as the right to exhibit a motion picture which may have some aesthetic value. Moreover, slow-moving procedures have a much more severe impact in the instant case than they had in *Freedman*. Though a movie exhibitor might suffer some financial loss if he were obliged to wait for a year or two while the administrative and judicial mills ground out a result, it is nevertheless quite likely that the public would ultimately see the film. In contrast, timing is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all. To require Shuttlesworth to submit his parade permit application months in advance would place a severe burden upon the exercise of his constitutionally protected rights. Cf. *Williams* v. *Rhodes*, 393 U. S. 23, 33 (1968).

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[4] None of our past decisions have squarely considered whether parade licenses must be handled on an expedited basis. In *Cox* v. *New Hampshire,* 312 U. S. 569 (1941), the question was not argued. In *Poulos* v. *New Hampshire,* 345 U. S. 395 (1953), Poulos' request for a permit to conduct religious services in a public park was refused by the Portsmouth City Council seven and one-half weeks before the first scheduled event. Since the time remaining was sufficient to obtain relief by way of mandamus, see 345 U. S., at 419–420 (opinion of Mr. Justice Frankfurter), there was no need to consider whether the State had a constitutional obligation to provide a more rapid procedure. And, of course, those cases which struck down regulatory schemes which purported to issue licenses on the basis of unconstitutional standards did not reach the question presented here. See, *e. g., Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Schneider* v. *State,* 308 U. S. 147, 163–165 (1939); *Largent* v. *Texas,* 318 U. S. 418 (1943); *Staub* v. *Baxley,* 355 U. S. 313 (1958).

I do not mean to suggest that a State or city may not reasonably require that parade permit applications be submitted early enough to allow the authorities and the judiciary to determine whether the parade proposal is consistent with the important interests respecting the use of the streets which local authority may legitimately protect. But such applications must be handled on an expedited basis so that rights of political expression will not be lost in a maze of cumbersome and slow-moving procedures.

Neither the city of Birmingham nor the State of Alabama has established such expedited procedures. See nn. 2 and 3, *supra*. Indeed, the city's parade ordinance does not establish any procedure at all to govern the consideration of applications. Section 1159 of the City Code does not state *when* an application must be submitted if it is to be considered timely. The ordinance does not state *how* an application is to be submitted to the "City Commission." [5] Nor have regulations been published which would answer these questions.[6]

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[5] It would be most remarkable if every parade application involving the march of 52 persons is considered in a plenary manner by the principal governmental body of a city so large as Birmingham. In fact, an offer of proof was made in the *Walker* proceedings that

In the absence of any guidelines, the most that can fairly be asked of petitioner is that he make a good-faith effort to obtain a permit from the city authorities. Shuttlesworth so acted when he approached the city official most likely to have the authority to deal with permit applications in an expedited manner—Commissioner Connor was the member of the City Commission in charge of public safety. It was Connor, not Shuttlesworth, who broke off all discussions relating to the issuance of permits. After the Commissioner declared that he lacked the power to act, it was reasonable to believe that no public authority would act in time. Since neither the city nor the State provided sufficiently expedited procedures for the consideration of parade permits, petitioner Shuttlesworth cannot be punished for the exercise of his constitutionally protected right of political expression.[7]

On this basis I concur in the reversal of the judgment of the Alabama Supreme Court.

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the City Commission had never passed on permit applications in the past, but had delegated the task to inferior officials. See Transcript, *supra*, n. 1, at 290. The proof was not admitted on the ground that it was irrelevant. *Ibid.*

[6] At the trial in *Walker* v. *Birmingham*, the City Clerk, who kept records of the parade permits that had been granted, stated that no regulations had been issued to fill in the gaps left by the Ordinance. See Transcript, *supra*, n. 1, at 286.

[7] I do not reach the question whether the principle followed in such cases as *Lovell, Schneider, Largent,* and *Staub*, see n. 4, *supra*, allowing persons to ignore entirely licensing schemes which unconstitutionally impinge on other forms of free expression, should be extended to cover "parade" permit statutes involving, as they do, a particularly important state interest.

ALDERMAN ET AL. *v.* UNITED STATES.

ON MOTION TO MODIFY ORDER OF REMAND TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

No. 133, Oct. Term, 1967. Certiorari denied October 9, 1967.—Rehearing and certiorari granted and case decided January 29, 1968.—Motion to modify argued May 2, 1968.—Reargued October 14, 1968.—Order of January 29, 1968, withdrawn, rehearing and certiorari granted, and case decided March 10, 1969.*

After petitioners in No. 133, O. T., 1967, were convicted of conspiring to transmit murderous threats in interstate commerce, they discovered that one petitioner's place of business had been subject to electronic surveillance by the Government. This Court refused to accept the Government's *ex parte* determination that "no overheard conversation in which any of the petitioners participated is arguably relevant to this prosecution," and vacated and remanded the case for further proceedings (390 U. S. 136). The Government moved to modify the order, urging that surveillance records should be subjected to *in camera* inspection by the trial judge, who would then turn over to petitioners only those materials arguably relevant to their prosecution. In Nos. 11 and 197 petitioners, who were convicted of national security violations, raised similar questions relating to the use of eavesdropped information. *Held:*

1. Suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, and not those who are aggrieved solely by the introduction of damaging evidence. Thus, codefendants and coconspirators have no special standing and cannot prevent the admission against them of information which has been obtained through electronic surveillance which is illegal against another. Pp. 171–176.

2. A petitioner would be entitled to the suppression of evidence violative of the Fourth Amendment where the Government unlawfully overheard conversations of the petitioner himself, or where the

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*Together with No. 11, *Ivanov* v. *United States,* and No. 197, *Butenko* v. *United States,* on certiorari to the United States Court of Appeals for the Third Circuit, argued October 14, 1968.

conversations occurred on his premises, whether or not he was present or participated therein. *Silverman* v. *United States,* 365 U. S. 505, 511–512. Pp. 176–180.

3. If the surveillance is found to have been unlawful, and if a petitioner is found to have standing, the Government must disclose to him the records of those overheard conversations which the Government was not entitled to use in building its case against him. Pp. 180–185.

(a) The task of determining those items which might have made a substantial contribution to the preparation of the Government's case is too complex and the margin for error too great to rely solely upon the *in camera* examination by the trial court. Pp. 181–182.

(b) The trial court should, where appropriate, place defendants and their counsel under enforceable orders against unwarranted disclosure of the materials they are entitled to inspect. P. 185.

(c) Defendants will not have an unlimited license to rummage in the Government's files, as they may need or be entitled to nothing beyond the specified records of overheard conversations and the right to cross-examine the appropriate officials regarding the connection between those records and the prosecution's case. P. 185.

No. 133, O. T., 1967, order of January 29, 1968, withdrawn, order denying certiorari set aside, rehearing and certiorari granted, 371 F. 2d 983, judgments vacated and remanded; Nos. 11 and 197, 384 F. 2d 554, judgments vacated and remanded.

Solicitor General Griswold reargued for the United States in No. 133, October Term, 1967, on the motion to modify the Court's Order of January 29, 1968, 390 U. S. 136. With him on the brief were *Assistant Attorney General Vinson, Louis F. Claiborne, John S. Martin, Jr., Beatrice Rosenberg,* and *Sidney M. Glazer.*

Edward Bennett Williams reargued for petitioners in No. 133, October Term, 1967, in opposition to the motion. With him on the brief were *Harold Ungar* and *W. H. Erickson.*

Mr. Williams argued the cause and filed a brief for petitioner in No. 11. *Charles Danzig,* by appointment of the Court, 393 U. S. 814, argued the cause and filed a brief for petitioner in No. 197.

Solicitor General Griswold argued the cause for the United States in Nos. 11 and 197. With him on the brief were *Assistant Attorney General Yeagley, Messrs. Claiborne* and *Martin,* and *Kevin T. Maroney.*

MR. JUSTICE WHITE delivered the opinion of the Court.

After the convictions of petitioners had been affirmed, and while their cases were pending here, it was revealed that the United States had engaged in electronic surveillance which might have violated their Fourth Amendment rights and tainted their convictions. A remand to the District Court being necessary in each case for adjudication in the first instance, the questions now before us relate to the standards and procedures to be followed by the District Court in determining whether any of the Government's evidence supporting these convictions was the product of illegal surveillance to which any of the petitioners are entitled to object.

No. 133, O. T., 1967. Petitioners Alderman and Alderisio, along with Ruby Kolod, now deceased, were convicted of conspiring to transmit murderous threats in interstate commerce, 18 U. S. C. §§ 371, 875 (c). Their convictions were affirmed on appeal, 371 F. 2d 983 (C. A. 10th Cir. 1967), and this Court denied certiorari, 389 U. S. 834 (1967). In their petition for rehearing, petitioners alleged they had recently discovered that Alderisio's place of business in Chicago had been the subject of electronic surveillance by the Government. Reading the response of the Government to admit that Alderisio's conversations had been overheard by unlawful electronic eavesdropping,[1] we granted the petition for rehearing over the objection of the United States that "no overheard conversation in which any of the petitioners participated is arguably relevant to this prosecution." In our *per curiam* opinion, 390 U. S. 136 (1968), we refused to accept the *ex parte* determination of relevance by the Department of Justice in lieu of adversary proceedings in the District Court, vacated the judgment of the Court of Appeals, and remanded the case to the District Court for further proceedings.

The United States subsequently filed a motion to modify that order. Although accepting the Court's order insofar as it required judicial determination of whether any of the prosecution's evidence was the product of illegal surveillance, the United States urged that in order to protect innocent third parties participating or referred to in irrelevant conversations overheard by the Government, surveillance records should first be subjected to *in camera* inspection by the trial judge, who would then turn over to the petitioners and their counsel only those materials arguably relevant to their prosecution. Petitioners opposed the motion, and the matter was argued before the Court last Term. We then set the case down for reargument at the opening of the current Term, 392 U. S. 919 (1968), the attention of the parties being directed to the disclosure issue and the question of standing to object to the Government's use of the fruits of illegal surveillance.[2]

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[1] In its brief on reargument, the Government suggests that no electronic surveillance was conducted at places owned by Alderisio, but rather was carried out only at premises owned by his associates or by firms which employed him. The Government also contends that Alderisio himself did not have desk space at the subject premises. Finally, the Government asserts that Alderman neither participated in any conversation overheard nor had any interest in the places which were the object of the surveillance. These allegations by the Government will have to be considered by the District Court in the first instance, and we express no opinion now on their merit.

Nos. 11 and 197. Both petitioners were convicted of conspiring to transmit to the Soviet Union information relating to the national defense of the United States, 18 U. S. C. §§ 794 (a), (c), and of conspiring to violate 18 U. S. C. § 951 by causing Butenko to act as an agent of the Soviet Union without prior notification to the Secretary of State. Butenko was also convicted of a substantive offense under 18 U. S. C. § 951. The Court of Appeals affirmed all but Ivanov's conviction on the second conspiracy count. 384 F. 2d 554 (C. A. 3d Cir. 1967). Petitions for certiorari were then filed in this Court, as was a subsequent motion to amend the

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[2] In our order of June 17, 1968, restoring the Government's motion to the calendar for reargument, 392 U. S. 919-920, we requested counsel to include the following among issues to be discussed in briefs and oral argument:

"(1) Should the records of the electronic surveillance of petitioner Alderisio's place of business be subjected to *in camera* inspection by the trial judge to determine the necessity of compelling the Government to make disclosure of such records to petitioners, and if so to what extent?

"(2) If *in camera* inspection is authorized or ordered, by what standards (for example, relevance and considerations of injury to persons or to reputations) should the trial judge determine whether the records are to be turned over to petitioners?

"(3) What standards are to be applied in determining whether each petitioner has standing to object to the use against him of the information obtained from the electronic surveillance of petitioner Alderisio's place of business? More specifically, does petitioner Alderisio have standing to object to the use of any or all information obtained from such electronic surveillance whether or not he was present on the premises or party to a particular overheard conversation? Also, does petitioner Alderman have standing to object to the use against him of any or all information obtained from the electronic surveillance of petitioner Alderisio's business establishment?"

Ivanov petition to raise an issue similar to that which was presented in No. 133, O. T. 1967.[3] Following the first argument in *Alderman* (*sub nom. Kolod* v. *United States*), the petitions for certiorari of both Ivanov and Butenko were granted, limited to questions nearly identical to those involved in the reargument of the *Alderman* case.[4]

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[3] The United States admits overhearing conversations of each petitioner, but where the surveillance took place and other pertinent details are unknown. In its brief the Government states:

"In some of the instances the installation had been specifically approved by the then Attorney General. In others the equipment was installed under a broader grant of authority to the F. B. I., in effect at that time, which did not require specific authorization. . . . [P]resent Department of Justice policy would call for specific authorization from the Attorney General for any use of electronic equipment in such cases."

In all three cases, the District Court must develop the relevant facts and decide if the Government's electronic surveillance was unlawful. Our assumption, for present purposes, is that the surveillance was illegal.

[4] In each case the grant of certiorari, 392 U. S. 923, was limited to the following questions:

"On the assumption that there was electronic surveillance of petitioner or a codefendant which violated the Fourth Amendment,

"(1) Should the records of such electronic surveillance be subjected to *in camera* inspection by the trial judge to determine the necessity of compelling the Government to make disclosure of such records to petitioner, and if so to what extent?

"(2) If *in camera* inspection is to be authorized or ordered, by what standards (for example, relevance, and considerations of national security or injury to persons or reputations) should the trial judge determine whether the records are to be turned over to the defendant?

"(3) What standards are to be applied in determining whether petitioner has standing to object to the use against him of information obtained from such illegal surveillance? More specifically, if illegal surveillance took place at the premises of a particular defendant,

"(a) Does that defendant have standing to object to the use against him of any or all information obtained from the illegal sur-

I.

The exclusionary rule fashioned in *Weeks* v. *United States,* 232 U. S. 383 (1914), and *Mapp* v. *Ohio,* 367 U. S. 643 (1961), excludes from a criminal trial any evidence seized from the defendant in violation of his Fourth Amendment rights. Fruits of such evidence are excluded as well. *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 391–392 (1920). Because the Amendment now affords protection against the uninvited ear, oral statements, if illegally overheard, and their fruits are also subject to suppression. *Silverman* v. *United States,* 365 U. S. 505 (1961); *Katz* v. *United States,* 389 U. S. 347 (1967).

In *Mapp* and *Weeks,* the defendant against whom the evidence was held to be inadmissible was the victim of the search. However, in the cases before us each petitioner demands retrial if any of the evidence used to convict him was the product of unauthorized surveillance, regardless of whose Fourth Amendment rights the surveillance violated. At the very least, it is urged that if evidence is inadmissible against one defendant or conspirator, because tainted by electronic surveillance illegal as to him, it is also inadmissible against his codefendant or coconspirator.

This expansive reading of the Fourth Amendment and of the exclusionary rule fashioned to enforce it is admittedly inconsistent with prior cases, and we reject it. The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were vio-

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veillance, whether or not he was present on the premises or party to the overheard conversation?

"(b) Does a codefendant have standing to object to the use against him of any or all information obtained from the illegal surveillance, whether or not he was present on the premises or party to the overheard conversation?"

lated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Coconspirators and codefendants have been accorded no special standing.

Thus in *Goldstein* v. *United States,* 316 U. S. 114 (1942), testimony induced by disclosing to witnesses their own telephonic communications intercepted by the Government contrary to 47 U. S. C. § 605 was held admissible against their coconspirators. The Court equated the rule under § 605 with the exclusionary rule under the Fourth Amendment.[5] *Wong Sun* v. *United States,* 371 U. S. 471 (1963), came to like conclusions. There, two defendants were tried together; narcotics seized from a third party were held inadmissible against one defendant because they were the product of statements made by him at the time of his unlawful arrest. But the same narcotics were found to be admissible against the codefendant because "[t]he seizure of this heroin invaded no right of privacy of person or premises which would entitle [him] to object to its use at his trial. Cf. *Goldstein* v. *United States,* 316 U. S. 114." *Wong Sun* v. *United States, supra,* at 492.

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[5] As the issue was put and answered by the Court:

"The question now to be decided is whether we shall extend the sanction for violation of the Communications Act so as to make available to one not a party to the intercepted communication the objection that its use outside the courtroom, and prior to the trial, induced evidence which, except for that use, would be admissible.

"No court has ever gone so far in applying the implied sanction for violation of the Fourth Amendment. While this court has never been called upon to decide the point, the federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized. *A fortiori* the same rule should apply to the introduction of evidence induced by the use or disclosure thereof to a witness other than the victim of the seizure. We think no broader sanction should be imposed upon the Government in respect of violations of the Communications Act." 316 U. S., at 121.

The Court noted that the principle had been applied "in at least fifty cases by the Circuit Courts of Appeals . . . not to mention many decisions by District Courts." *Id.,* at 121, n. 12.

The rule is stated in *Jones* v. *United States,* 362 U. S. 257, 261 (1960):

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. . . .
>
> "Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."[6]

This same principle was twice acknowledged last Term. *Mancusi* v. *DeForte,* 392 U. S. 364 (1968); *Simmons* v. *United States,* 390 U. S. 377 (1968).[7]

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[6] The "person aggrieved" language is from Fed. Rule Crim. Proc. 41 (e). *Jones* thus makes clear that Rule 41 conforms to the general standard and is no broader than the constitutional rule.

[7] *McDonald* v. *United States,* 335 U. S. 451 (1948), is not authority to the contrary. It is not at all clear that the *McDonald* opinion would automatically extend standing to a codefendant. Two of the five Justices joining the majority opinion did not read the opinion to do so and found the basis for the codefendant's standing to be the fact that he was a guest on the premises searched. "But even a guest may expect the shelter of the rooftree he is under against criminal intrusion." *Id.,* at 461 (Jackson, J., concurring). Cf. *Jones* v. *United States,* 362 U. S. 257 (1960). Nor does *Hoffa* v. *United States,* 385 U. S. 293 (1966), lend any support to petitioners' position, since the Court expressly put aside the issue of standing.

We adhere to these cases and to the general rule that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted. *Simmons* v. *United States,* 390 U. S. 377 (1968); *Jones* v. *United States,* 362 U. S. 257 (1960). Cf. *Tileston* v. *Ullman,* 318 U. S. 44, 46 (1943). None of the special circumstances which prompted *NAACP* v. *Alabama,* 357 U. S. 449 (1958), and *Barrows* v. *Jackson,* 346 U. S. 249 (1953), are present here. There is no necessity to exclude evidence against one defendant in order to protect the rights of another. No rights of the victim of an illegal search are at stake when the evidence is offered against some other party. The victim can and very probably will object for himself when and if it becomes important for him to do so.

What petitioners appear to assert is an independent constitutional right of their own to exclude relevant and probative evidence because it was seized from another in violation of the Fourth Amendment. But we think there is a substantial difference for constitutional purposes between preventing the incrimination of a defendant through the very evidence illegally seized from him and suppressing evidence on the motion of a party who cannot claim this predicate for exclusion.

The necessity for that predicate was not eliminated by recognizing and acknowledging the deterrent aim of the rule. See *Linkletter* v. *Walker,* 381 U. S. 618 (1965); *Elkins* v. *United States,* 364 U. S. 206 (1960). Neither those cases nor any others hold that anything which deters illegal searches is thereby commanded by the Fourth Amendment. The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.

We do not deprecate Fourth Amendment rights. The security of persons and property remains a fundamental value which law enforcement officers must respect. Nor should those who flout the rules escape unscathed. In this respect we are mindful that there is now a comprehensive statute making unauthorized electronic surveillance a serious crime.[8] The general rule under the statute is that official eavesdropping and wiretapping are permitted only with probable cause and a warrant. Without experience showing the contrary, we should not assume that this new statute will be cavalierly disregarded or will not be enforced against transgressors.

Of course, Congress or state legislatures may extend the exclusionary rule and provide that illegally seized evidence is inadmissible against anyone for any purpose.[9] But for constitutional purposes, we are not now inclined to expand the existing rule that unlawful wiretapping or eavesdropping, whether deliberate or negligent, can produce nothing usable against the person aggrieved by the invasion.

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[8] Title III, Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 211. Not only does the Act impose criminal penalties upon those who violate its provisions governing eavesdropping and wiretapping, 82 Stat. 213 (18 U. S. C. § 2511 (1964 ed., Supp. IV)) (fine of not more than $10,000, or imprisonment for not more than five years, or both), but it also authorizes the recovery of civil damages by a person whose wire or oral communication is intercepted, disclosed, or used in violation of the Act, 82 Stat. 223 (18 U. S. C. § 2520 (1964 ed., Supp. IV)) (permitting recovery of actual and punitive damages, as well as a reasonable attorney's fee and other costs of litigation reasonably incurred).

[9] Congress has not done so. In its recent wiretapping and eavesdropping legislation, Congress has provided only that an "aggrieved person" may move to suppress the contents of a wire or oral communication intercepted in violation of the Act. Title III, Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 221 (18 U. S. C. § 2518 (10)(a) (1964 ed., Supp. IV)). The Act's legislative history

II.

In these cases, therefore, any petitioner would be entitled to the suppression of government evidence originating in electronic surveillance violative of his own Fourth Amendment right to be free of unreasonable searches and seizures. Such violation would occur if the United States unlawfully overheard conversations of a petitioner himself or conversations occurring on his premises, whether or not he was present or participated in those conversations. The United States concedes this much and agrees that for purposes of a hearing to determine whether the Government's evidence is tainted by illegal surveillance, the transcripts or recordings of the overheard conversations of any petitioner or of third persons on his premises must be duly and properly examined in the District Court.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART, who are in partial dissent on this phase of the case, object to our protecting the homeowner against the use of third-party conversations overheard on his premises by an unauthorized surveillance. Their position is that unless the conversational privacy of the homeowner himself is invaded, there is no basis in the Fourth Amendment for excluding third-party conversations overheard on his premises. We cannot agree. If the police make an unwarranted search of a house and seize tangible property belonging to third parties—even a transcript of a third-party conversation—the homeowner may object to

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indicates that "aggrieved person," the limiting phrase currently found in Fed. Rule Crim. Proc. 41 (e), should be construed in accordance with existent standing rules. See S. Rep. No. 1097, 90th Cong., 2d Sess., at 91, 106.

its use against him, not because he had any interest in the seized items as "effects" protected by the Fourth Amendment, but because they were the fruits of an unauthorized search of his house, which is itself expressly protected by the Fourth Amendment.[10] Nothing seen or found on the premises may legally form the basis for an arrest or search warrant or for testimony at the homeowner's trial, since the prosecution would be using the fruits of a Fourth Amendment violation. *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385 (1920); *Johnson* v. *United States,* 333 U. S. 10 (1948); *Wong Sun* v. *United States,* 371 U. S. 471 (1963).

The Court has characteristically applied the same rule where an unauthorized electronic surveillance is carried out by physical invasion of the premises. This much the dissent frankly concedes. Like physical evidence which might be seized, overheard conversations are fruits of an illegal entry and are inadmissible in evidence. *Silverman* v. *United States,* 365 U. S. 505 (1961); *Wong Sun* v. *United States, supra.* When *Silverman* was decided, no right of conversational privacy had been recognized as such; the right vindicated in that case was the Fourth Amendment right to be secure in one's own home. In *Wong Sun,* the words spoken by Blackie Toy when the police illegally entered his house were not usable against him because they were the fruits of a physical invasion of his premises which violated the Fourth Amendment.

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[10] If the police enter a house pursuant to a valid warrant authorizing the seizure of specified gambling paraphernalia but discover illegal narcotics in the process of the search, the narcotics may be seized and introduced in evidence in the prosecution of the homeowner, whether the narcotics belong to him or to a third party. *E. g., Harris* v. *United States,* 331 U. S. 145, 155 (1947). But if the officers have neither a warrant nor the consent of the householder, it is elementary Fourth Amendment law that the narcotics are suppressible on his motion. In both cases, however, the homeowner's interest in the narcotics and his standing to object to their seizure are the same; and insofar as the Fourth Amendment's protection of "effects" is concerned, the right of the officer to seize the contraband without a warrant and use it in evidence is identical. The reason that the narcotics may be seized and introduced in evidence in the first case where there was a valid warrant, in spite of the householder's interest in the narcotics and his standing to object, but not in the second case where there was no warrant is not the simple reason suggested by MR. JUSTICE HARLAN that the householder has a property interest in the narcotics and therefore has "standing" to object. Rather, it is because in the first case there was no illegal invasion of the premises, while in the second the officer's entry and search violated the Fourth Amendment, the narcotics being the fruit of that illegality.

Because the Court has now decided that the Fourth Amendment protects a person's private conversations as well as his private premises, *Katz* v. *United States,* 389 U. S. 347 (1967), the dissent would discard the concept that private conversations overheard through an illegal entry into a private place must be excluded as the fruits of a Fourth Amendment violation. Although officers without a valid warrant may not search a house for physical evidence or incriminating information, whether the owner is present or away, the dissent would permit them to enter that house without consent and without a warrant, install a listening device, and use any overheard third-party conversations against the owner in a criminal case, in spite of the obvious violation of his Fourth Amendment right to be secure in his own dwelling. Even if the owner is present on his premises during the surveillance, he would have no complaint unless his own conversations were offered or used against him. Information from a telephone tap or from the microphone in the kitchen or in the rooms of guests or children would be freely usable as long as the homeowner's own conversations are not monitored and used against him. Indeed, if the police, instead of installing a device, secreted themselves on the premises, they could neither testify about nor use against the owner anything they saw or carried away, but would be free to use against him everything they overheard except his own conversations. And should police overhear third parties describing narcotics which they have discovered in the owner's desk drawer, the police could not then open the drawer and seize the narcotics, but they could secure a warrant on the basis of what they had heard and forthwith seize the narcotics pursuant to that warrant.[11]

These views we do not accept. We adhere to the established view in this Court that the right to be secure in one's house against unauthorized intrusion is not limited to protection against a policeman viewing or seizing tangible property—"papers" and "effects." Otherwise, the express security for the home provided by the Fourth Amendment would approach redundancy. The rights of the owner of the premises are as clearly invaded when the police enter and install a listening device in his house as they are when the entry is made to undertake a warrantless search for tangible property; and the prosecution as surely employs the fruits of an illegal search of the home when it offers overheard third-party conversations as it does when it introduces tangible evidence belonging not to the homeowner, but to others. Nor do we believe that *Katz,* by holding that the Fourth Amendment protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends to the home or to overrule the existing doctrine, recognized at least since *Silverman,* that conversations as well as property are excludable from the criminal trial when they are found to be the fruits of an illegal invasion of the home. It was noted in *Silverman,* 365 U. S., at 511–512, that

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[11] MR. JUSTICE HARLAN would also distinguish between the situation where a document belonging to a third party and containing his own words is seized from the premises of another without a warrant and the situation where the third party's words are spoken and overheard by electronic surveillance. Under that view the words of the third party would be admissible in the latter instance but not in the former. We would exclude the evidence in both cases.

So also we do not distinguish between electronic surveillance which is carried out by means of a physical entry and surveillance which penetrates a private area without a technical trespass. This much, we think, *Katz* makes quite clear. In either case, officialdom invades an area in which the homeowner has the right to expect privacy for himself, his family, and his invitees, and the right to object to the use against him of the fruits of that invasion, not because the rights of others have been violated, but because his own were. Those who converse and are overheard when the owner is not present also have a valid objection unless the owner of the premises has consented to the surveillance. Cf. *Mancusi* v. *DeForte,* 392 U. S. 364, 367–370 (1968). The Fourth Amendment protects reasonable expectations of privacy and does not protect persons engaged in crime from the risk that those with whom they associate or converse will cooperate with the Government. *Hoffa* v. *United States,* 385 U. S. 293, 303 (1966).

> "This Court has never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard."

The Court proceeded to hold quite the contrary. We take the same course here.

III.

The remaining aspect of these cases relates to the procedures to be followed by the District Court in resolving the ultimate issue which will be before it—whether the evidence against any petitioner grew out of his illegally overheard conversations or conversations occurring on his premises.[12] The question as stated in *Wong Sun* v. *United States,* 371 U. S. 471, 488 (1963), is " 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' " See also *Nardone* v. *United States*, 308 U. S. 338, 341 (1939).

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[12] It seems that in none of these cases were there introduced any recordings, transcripts, or other evidence of the actual conversations overheard by electronic surveillance.

The Government concedes that it must disclose to petitioners any surveillance records which are relevant to the decision of this ultimate issue. And it recognizes that this disclosure must be made even though attended by potential danger to the reputation or safety of third parties or to the national security—unless the United States would prefer dismissal of the case to disclosure of the information. However, the Government contends that it need not be put to this disclose-or-dismiss option in the instant cases because none of the information obtained from its surveillance is "arguably relevant" to petitioners' convictions, in the sense that none of the overheard conversations arguably underlay any of the evidence offered in these cases. Although not now insisting that its own evaluation of relevance should be accepted automatically and without judicial scrutiny, the United States urges that the records of the specified conversations be first submitted to the trial judge for an *in camera* examination. Any record found arguably relevant by the judge would be turned over to the petitioner whose Fourth Amendment rights have been violated, and that petitioner would then have the opportunity to use the disclosed information in his attempt to show that the Government has used tainted evidence to convict him. Material not arguably relevant would not be disclosed to any petitioner.[13]

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[13] This would be true even though the material on its face contained no threat of injury to the public interest or national security, apparently because, in the Government's view, it would be very difficult to distinguish between that which threatened and that which

Although this may appear a modest proposal, especially since the standard for disclosure would be "arguable" relevance, we conclude that surveillance records as to which any petitioner has standing to object should be turned over to him without being screened *in camera* by the trial judge. Admittedly, there may be much learned from an electronic surveillance which ultimately contributes nothing to probative evidence. But winnowing this material from those items which might have made a substantial contribution to the case against a petitioner is a task which should not be entrusted wholly to the court in the first instance. It might be otherwise if the trial judge had only to place the transcript or other record of the surveillance alongside the record evidence and compare the two for textual or substantive similarities. Even that assignment would be difficult enough for the trial judge to perform unaided. But a good deal more is involved. An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances. Unavoidably, this is a matter of judgment, but in our view the task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court to identify those records which might have contributed to the Government's case.[14]

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did not. As explained below, we think similar difficulties inhere in distinguishing between records which are relevant to showing taint and those which are not.

[14] In both the volume of the material to be examined and the complexity and difficulty of the judgments involved, cases involving

The United States concedes that when an illegal search has come to light, it has the ultimate burden of persuasion to show that its evidence is untainted. But at the same time petitioners acknowledge that they must go forward with specific evidence demonstrating taint. "[T]he trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin." *Nardone* v. *United States,* 308 U. S. 338, 341 (1939). With this task ahead of them, and if the hearings are to be more than a formality and petitioners not left entirely to reliance on government testimony, there should be turned over to them the records of those overheard conversations which the Government was not entitled to use in building its case against them.

Adversary proceedings are a major aspect of our system of criminal justice. Their superiority as a means for attaining justice in a given case is nowhere more evident than in those cases, such as the ones at bar, where an issue must be decided on the basis of a large volume of

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electronic surveillance will probably differ markedly from those situations in the criminal law where *in camera* procedures have been found acceptable to some extent. *Dennis* v. *United States,* 384 U. S. 855 (1966) (disclosure of grand jury minutes subject to *in camera* deletion of "extraneous material"); *Palermo* v. *United States,* 360 U. S. 343, 354 (1959) (whether the Jencks Act, 18 U. S. C. § 3500, requires disclosure of document to the defense); *Roviaro* v. *United States,* 353 U. S. 53 (1957) (disclosure of informant's identity). In the *Dennis* case the Court noted that ordinarily "[t]rial judges ought not be burdened with the task or the responsibility of examining sometimes voluminous grand jury testimony," and that it is not "realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities." 384 U. S., at 874-875.

factual materials, and after consideration of the many and subtle interrelationships which may exist among the facts reflected by these records. As the need for adversary inquiry is increased by the complexity of the issues presented for adjudication, and by the consequent inadequacy of *ex parte* procedures as a means for their accurate resolution, the displacement of well-informed advocacy necessarily becomes less justifiable.

Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands. It may be that the prospect of disclosure will compel the Government to dismiss some prosecutions in deference to national security or third-party interests. But this is a choice the Government concededly faces with respect to material which it has obtained illegally and which it admits, or which a judge would find, is arguably relevant to the evidence offered against the defendant.[15]

We think this resolution will avoid an exorbitant expenditure of judicial time and energy and will not unduly prejudice others or the public interest. It must be remembered that disclosure will be limited to the transcripts of a defendant's own conversations and of those which took place on his premises. It can be safely assumed that much of this he will already know, and disclosure should therefore involve a minimum hazard to others. In addition, the trial court can and should, where appropriate, place a defendant and his counsel under enforceable orders against unwarranted disclosure of the materials which they may be entitled to inspect. See Fed. Rule Crim. Proc. 16 (e). We would not expect the district courts to permit the parties or counsel to take these orders lightly.

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[15] The dissents, it should be noted, would require turnover of arguably relevant material, whatever its impact on national security might be. To this extent there is agreement that the defendant's interest in excluding the fruits of illegally obtained evidence entitles him to the product of the surveillance. Given this basic proposition, the matter comes down to a judgment as to whether *in camera* inspection would characteristically be sufficiently reliable when national security interests are at stake. On this issue, the majority and the dissenters part company.

None of this means that any defendant will have an unlimited license to rummage in the files of the Department of Justice. Armed with the specified records of overheard conversations and with the right to cross-examine the appropriate officials in regard to the connection between those records and the case made against him, a defendant may need or be entitled to nothing else. Whether this is the case or not must be left to the informed discretion, good sense, and fairness of the trial judge. See *Nardone* v. *United States,* 308 U. S. 338, 341–342 (1939).[16]

IV.

Accordingly, in No. 133, O. T. 1967, the motion of the United States is denied to the extent that it requests an initial *in camera* inspection of the fruits of any unlawful surveillance and the withholding of those portions of the materials which the trial judge might deem irrelevant to these convictions. Primarily because of our decision with respect to standing, however, the order and judgment of January 29, 1968, are withdrawn. The order denying to petitioners a writ of certiorari is set aside. The petition for rehearing is granted, and the petition for certiorari is granted as to both Alderisio and Alderman. The judgments of the Court of Appeals for the Tenth Circuit in No. 133, O. T. 1967, and the judgments of the Court of Appeals for the Third Circuit in Nos. 11 and 197 are vacated, and each of the cases is remanded to the District Court for further proceedings consistent with this opinion, that is, for a hearing, findings, and conclusions (1) on the question of whether with respect to any petitioner there was electronic surveillance which violated his Fourth Amendment rights, and (2) if there was such surveillance with respect to any petitioner, on the nature and relevance to his conviction of any conversations which may have been overheard through that surveillance. The District Court should confine the evidence presented by both sides to that which is material to the question of the possible violation of a petitioner's Fourth Amendment rights, to the content of conversations illegally overheard by surveillance which violated those rights and to the relevance of such conversations to the petitioner's subsequent conviction. The District Court will make such findings of fact on those questions as may be appropriate in light of the further evidence and of the entire existing record. If the District Court decides on the basis of such findings (1) that there was electronic surveillance with respect to one or more petitioners but not any which violated the Fourth Amendment, or (2) that although there was a surveillance in violation of one or more of the petitioners' Fourth Amendment rights, the conviction of such petitioner was not tainted by the use of evidence so obtained, it will enter new final judgments of conviction based on the existing record as supplemented by its further findings, thereby preserving to all affected parties the right to seek further appropriate appellate review. If, on the other hand, the District Court concludes in such further proceedings that there was a violation of any petitioner's Fourth Amendment rights and that the conviction of the petitioner was tainted by such violation, it would then become its duty to accord such petitioner a new trial.

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[16] THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE WHITE join the entire opinion of the Court. In addition, MR. JUSTICE HARLAN and MR. JUSTICE STEWART join the opinion to the extent that it denies standing to codefendants, coconspirators, and others whose Fourth Amendment rights have not been violated by the electronic surveillance involved. The four members of the Court joining the entire opinion agree with the opinion in recognizing the householder's standing to object to evidence obtained from an unauthorized electronic surveillance of his premises even where his own conversations are not overheard; MR. JUSTICE FORTAS concurs in the judgment to this extent. Finally, MR. JUSTICE STEWART, in addition to the four members of the Court joining the entire opinion, agrees with Part III of the opinion.

Vacated and remanded.

MR. JUSTICE DOUGLAS, while joining the opinion of the Court, concurs in Part II of the opinion of MR. JUSTICE FORTAS and would hold that the protection of the Fourth Amendment includes also those against whom the investigation is directed.

MR. JUSTICE STEWART. I join MR. JUSTICE HARLAN's separate opinion, except insofar as it would authorize *in camera* proceedings in the *Ivanov* and *Butenko* cases. I would apply the same standards to all three cases now before us, agreeing to that extent with the opinion of the Court.

MR. JUSTICE BLACK dissents, adhering to his dissent in *Katz* v. *United States,* 389 U. S. 347, 364–374 (1967).

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

The Court's careful opinion is, I think, constructed on a faulty premise, which substantially undermines the validity of its ultimate conclusions. The majority confronts these cases as if each of the two major problems they raise can be solved in only one of two ways. The Court seems to assume that *either* the traditional standing doctrine is to be expanded *or* that the traditional doctrine is to be maintained. Again, it is assumed that *either* an *in camera* decision is to be made by the judge in every case *or* that there is to be an automatic turnover of all conversations in every case. I do not believe, however, that the range of choice open to us on either issue is restricted to the two alternatives the Court considers. On both issues, there is a third solution which would, in my view, more satisfactorily accommodate the competing interests at stake.

I.

STANDING.

I am in substantial agreement with the reasons the Court has given for refusing to expand the traditional standing doctrine to permit a Fourth Amendment challenge to be raised by either a codefendant or a coconspirator.[1] But it does not follow from this that we may apply the traditional standing rules without further analysis. The traditional rules, as the majority correctly understands them, would grant standing with regard to (1) conversations in which the accused himself participated and (2) *all* conversations occurring on the accused's "premises," regardless of whether he participated in the particular conversation in any way. As I hope to show, the traditional rationale for this second rule—granting standing to the property owner—does not fit a case involving the infringement of conversational privacy. Moreover, no other persuasive rationale can be developed in support of the property owner's right to make a Fourth Amendment claim as to conversations in which he did not himself participate. Consequently, I would hold that, in the circumstances before us, standing should be granted only to those who actually participated in the conversation that has been illegally overheard.

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[1] I also am unable to accept my Brother FORTAS' suggestion that standing be accorded to any defendant who can show that an illegal search or seizure was directed against him. As my Brother FORTAS himself recognizes in stopping short of an extreme position that rejects all standing limitations, a proper decision on this issue cannot only consider the fact that a broadened standing rule may add marginally to the impact of the exclusionary rule on unconstitutional police conduct. Rather, one must also consider that my Brother FORTAS' rule permits a defendant to invade the privacy of others to hear conversations in which he did not participate. Moreover, the rule would entail very substantial administrative difficulties. In the majority of cases, I would imagine that the police plant a bug with the expectation that it may well produce leads to a large number of crimes. A lengthy hearing would, then, appear to be necessary in order to determine whether the police knew of an accused's criminal activity at the time the bug was planted and whether the police decision to plant a bug was moti-

A.

There is a very simple reason why the traditional law of standing permits the owner of the premises to exclude a tangible object illegally seized on his property, despite the fact that he does not own the particular object taken by the police. Even though he does not have title to the object, the owner of the premises is in possession of it—and we have held that a property interest of even less substance is a sufficient predicate for standing under the Fourth Amendment. *Jones* v. *United States,* 362 U. S. 257 (1960).[2] This simple rationale does not, how-

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vated by an effort to obtain information against the accused or some other individual. I do not believe that this administrative burden is justified in any substantial degree by the hypothesized marginal increase in Fourth Amendment protection.

[2] The Court suggests, *ante,* at 177, n. 10, that I am wrong in finding that the traditional grant of standing to the property owner may properly be grounded on the simple fact of the owner's domin-

ever, justify granting standing to the property owner with regard to third-party conversations. The absent property owner does not have a property interest of any sort in a conversation in which he did not participate. The words that were spoken are gone beyond recall.[3]

Consequently, in order to justify the traditional rule, one must argue, as does the majority, that the owner of the premises should be granted standing because the bugged third-party conversations are "fruits" of the police's infringement of the owner's property rights. The "fruits" theory, however, does not necessarily fit when the police overhear private conversations in violation of the Fourth Amendment. As *Katz* v. *United States*, 389 U. S. 347, 352–353 (1967), squarely holds, the right to the privacy of one's conversation does not

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ion over all physical objects on his premises. The majority argues that even though a particular object (say a packet of narcotics) is not described in a valid search warrant, it may nevertheless be seized if the police find the narcotics in their search for the other evidence of crime. It follows from this, says the Court, that the householder's possessory interest in the seized property is not a sufficient basis for standing. But this argument ignores the fact that an accused may have *standing* to raise a Fourth Amendment claim and yet lose on the *merits*. In the case the Court hypothesizes, the householder has standing because he has lost possession of an object formerly under his control. However, he loses on the merits because the police seizure was reasonable under the circumstances.

[3] Thus, unlike the Court, I find it quite easy to distinguish "between the situation where a document belonging to a third party and containing his own words is seized from the premises of another without a warrant and the situation where the third party's words are spoken and overheard by electronic surveillance." *Ante*, at 179, n. 11. While the absent owner can read the document when he returns to his home, he cannot summon back the words that were spoken in his absence. In the one case, the owner is personally aggrieved by the police action; in the other case, he is not.

hinge on whether the Government has committed a technical trespass upon the premises on which the conversations took place. *Olmstead* v. *United States,* 277 U. S. 438 (1928), is no longer the law. If in fact there has been no trespass upon the premises, I do not understand how traditional theory permits the owner to complain if a conversation is overheard in which he did not participate. Certainly the owner cannot suppress records of such conversations on the ground that they are the "fruits" of an unconstitutional invasion of his property rights. See *Goldman* v. *United States,* 316 U. S. 129, 135–136 (1942).

It is true, of course, that the "fruits" theory would require a different result if the police used a listening device which did physically trespass upon the accused's premises. But the fact that this theory depends completely on the presence or absence of a technical trespass only serves to show that the entire theoretical basis of standing law must be reconsidered in the area of conversational privacy. For we have not buried *Olmstead,* so far as it dealt with the substance of Fourth Amendment rights, only to give it new life in the law of standing. Instead, we should reject traditional property concepts entirely, and reinterpret standing law in the light of the substantive principles developed in *Katz.* Standing should be granted to every person who participates in a conversation he legitimately expects will remain private—for it is such persons that *Katz* protects.[4] On the other hand, property owners should not be permitted to assert a Fourth Amendment claim in this area if we are to respect the principle, whose vitality the Court has now once again reaffirmed, which establishes "the general rule that Fourth Amendment rights are personal rights which . . . may not be vicariously asserted." *Ante,* at 174. For granting property owners standing does not permit them to vindicate intrusions upon their *own* privacy, but simply permits criminal defendants to intrude into the private lives of others.

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[4] It seems clear that, under the *Katz* rationale, a person is personally aggrieved by electronic surveillance not only when he is actually speaking but also when he is listening to the confidences of others.

The following hypothetical suggests the paradoxical quality of the Court's rule. Imagine that I own an office building and permit a friend of mine, Smith, to use one of the vacant offices without charge. Smith uses the office to have a private talk with a third person, Jones. The next day, I ask my friend to tell me what Jones had said in the office I had given him. Smith replies that the conversation was private, and that what was said was "none of your business." Can it be that I could properly feel aggrieved because the conversation occurred on my property? It would make no sense if I were to reply to Smith: "*My privacy* has been infringed if you do not tell me what was said, for I own the *property!*" It is precisely the other way around—Smith is telling me that when he and Jones had talked together, they had a legitimate expectation that their conversation would remain secret, even from me as the property owner.

Now suppose that I had placed a listening device in the office I had given to Smith, without telling him. Could anyone doubt that I would be guilty of an outrageous violation of the privacy of Smith and Jones if I then listened to what they had said? It would be ludicrous to defend my conduct on the ground that I, after all, was the owner of the office building. The case does not stand differently if I am accused of a crime and demand the right to hear the Smith-Jones conversation which the police had monitored. The Government doubtless has violated the privacy of Smith and Jones, but their privacy would be violated *further* if the conversation were also made available to me.[5]

In the field of conversational privacy, the Fourth Amendment protects persons, not places. See *Katz* v. *United States,* 389 U. S. 347, 351 (1967). And a man can only be in one place at one time. If the privacy of his conversation is respected at that place, he may engage in all those activities for which that privacy is an essential prerequisite. His *privacy* is not at all disturbed by the fact that other people in other places cannot speak without the fear of being overheard. That fact may be profoundly disturbing to the man whose privacy remains intact. But it remains a fact about *other* people's privacy. To permit a criminal defendant to complain about such intrusions is to permit the vicarious assertion of Fourth Amendment rights—a step which I decline to take in relation to property owners for much the same reasons as those which have impelled the Court to deny standing to coconspirators.

In rejecting the "property" rule advanced by the Court, I do not mean to suggest that standing may never properly be granted to permit the vicarious assertion of Fourth Amendment rights. While it is arguable that an individual should be permitted to raise a constitutional claim when the privacy of members of his family has been violated, I need not reach this question on the facts of the cases before us. It must be noted, however, that even if this Court recognized a man's right to protest whenever the privacy of his family was infringed, the lines the majority draws today would still seem extremely arbitrary. Under the prevailing "property" rule, for example, a husband generally cannot complain if the police overhear his wife talking at her office or in a public phone booth, cf. *Katz* v. *United States, supra,* although he can complain when the police overhear her talking at home. Yet surely the husband's interest in his wife's privacy is equally worthy of respect in all three cases. If standing is to be extended to protect a person's interest in his family's privacy, an individual should be permitted to make a constitutional claim *whenever* a family member's reasonable expectation of privacy has been infringed, regardless of the place where his privacy was invaded. Indeed, the Court's emphasis on property ownership could well mean that a husband, as owner of a particular property, is entitled to complain as to a violation of his wife's privacy, but that the wife could not complain as to the unlawful surveillance of her husband since she did not have a sufficiently substantial interest in the property on which the intrusion occurred. In contrast, if a perfect stranger is overheard on one's property, standing is established. In sum, I simply cannot discern a coherent policy behind the Court's solicitude for property interests in this area.

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[5] This is not to say, of course, that the property owner could not bring a civil action to have the illegal listening device removed from his premises. He simply could not hear what the listening device had recorded, if none of his own conversations had been overheard.

B.

The Court's lengthy discussion of my position loses sight of the basic justification for the narrower standing rule I have advanced. To recapitulate, it is my central aim to show that the right to conversational privacy is a personal right, not a property right. It follows from this that the Court's rule permits property owners to assert vicariously the personal rights of others. Indeed, granting standing to property owners compromises the personal privacy of others.

The Court's response seems to be that the Fourth Amendment protects "houses" as well as "persons." But this is simply to treat private conversations as if they were pieces of tangible *property*. Since an individual cannot carry his possessions with him wherever he goes, the Fourth Amendment protects a person's "house" so that his personal possessions may be kept out of the Government's easy reach. In contrast, a man must necessarily carry his voice around with him, and cannot leave it at home even if he wishes. When a man is not at home, he cannot converse there. There is thus no need to protect a man's "house" in order to protect *his* right to engage in private conversation. Consequently, the Court has not increased the scope of an accused's *personal* privacy by holding that the police have unconstitutionally invaded his "house" by putting a "bug" there. Houses do not speak; only people do. The police have violated only the *privacy* of those persons whose conversations are overheard.

I entirely agree, however, that if the police see a person's tangible property while committing their trespass, they may not constitutionally use this knowledge either to obtain a search warrant or to gain a conviction. Since a man has no choice but to leave the bulk of his physical possessions in his "house," the Fourth Amendment must protect his "house" in this way or else the immunity of his personal possessions from arbitrary search could not be assured. Thus if an individual's personal *possessions* are to be protected at all, they must be protected in his house; but a person's private *conversations* are protected as much as is possible when he can complain as to any conversation in which he personally participated. To go further and protect other conversations occurring on his property is simply to give the householder the right to complain as to the Government's treatment of others.

C.

While the Court grants special standing rights to property owners, it refuses to reach the question whether employees, business visitors, social guests, and other persons with less substantial property interests are also entitled to special standing privileges. Yet this question will be presented to the District Court on remand in the *Alderisio* case,[6] and it will doubtless be an issue in many of the other cases now on our docket which we will remand for reconsideration in the light of our decision today. While a definitive solution to this problem is obviously premature, the Court's failure to give the lower courts any guidance whatever on this point will result in widespread confusion as trial judges throughout the land attempt to divine the rationale behind the property rule established today. Confusion will be compounded by our own past decisions which have decisively rejected the notion that the accused must necessarily have a possessory interest in the premises before he may assert a Fourth Amendment claim. See *United States* v. *Jeffers,* 342 U. S. 48 (1951); *Jones* v. *United States,* 362 U. S. 257 (1960); *Mancusi* v. *DeForte,* 392 U. S. 364 (1968). But it will not do simply to incorporate the standing law developed in those cases in an effort to solve the problem before us. For our past decisions involved situations in which the police search was directed against the individual seeking to invoke the Fourth Amendment. Here, however, the question is whether an individual may hear the conversations of third parties.[7] If, for example, it develops at the hearing that petitioner Alderisio simply had a bare right to remain on the business premises that were bugged, cf. *Jones* v. *United States, supra,* it surely could not be argued that his privacy had been infringed even though he had not been personally involved in any of the conversations that had been overheard. The Court seems duty bound to make at least this much clear.[8]

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[6] As the Court points out, *ante,* at 168, n. 1, the Government denies that electronic surveillance took place on property owned by Alderisio. Rather, the premises were owned either by firms which employed Alderisio or by "business associates."

[7] I have not thought it necessary to deal with the subsidiary question of the standing of any of these petitioners to challenge at trial any evidence submitted against them that is alleged to be a fruit of a bugged conversation in which they participated. I agree that this is a question that should be left to the District Court for determination in the first instance at the hearing on remand.

II.

IN CAMERA PROCEEDINGS.

While I would hold that property owners have no right as such to hear conversations in which they were not participants, it appears to me that at a minimum the Court should adopt the Government's suggested judicial screening procedure with regard to third-party conversations. Property owners should not be permitted to intrude into the private lives of others unless a trial judge determines that the conversation at issue is at least arguably relevant to the pending prosecution.

On the other hand, I would agree that in the typical case, the prosecution should be required to hand over the records of all conversations in which the accused played a part. Since the other parties to these conversations knew they were talking to the accused, they can hardly have an important interest in concealing from him what they said to him. Whatever risk of unauthorized disclosure is involved may generally be minimized even further by the issuance of appropriate protective orders. Fed. Rule Crim. Proc. 16 (e).

There is, however, at least one class of cases in which the standard considerations do not apply. I refer to the situations exemplified by *Ivanov* and *Butenko,* in which the defendant is charged, under one statute or another, with spying for a foreign power. In contrast to the typical situation, here the accused may learn important new information even if the turnover is limited to conversations in which he was a participant. For example, he may learn the location of a listening device—a fact that may be of crucial significance in espionage work. Moreover, he will be entitled to learn this fact even though a valid warrant has subsequently been issued authorizing electronic surveillance at the same location. Similarly, the accused may find out that the United States has obtained certain information that his foreign government believes is still secret, even when our Government has also received this information from an independent source in a constitutional way. And he may learn that those in whom he has been reposing confidence are in fact American undercover agents.

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[8] As the Court's justification of its "property" rule seems to center exclusively on the right of homeowners to protest intrusions into their homes it may well be that the rights of owners of business premises should be stringently limited.

Even more important, there is much less reason to believe that a protective court order will effectively deter the defendant in an espionage case from turning over the new information he has received to those who are not entitled to it. For in an espionage case, the defendant is someone the grand jury has found is likely to have passed secrets to a foreign power. It is one thing to believe that the normal criminal defendant will refuse to pass on information if threatened with severe penalties for unauthorized disclosure. It is quite a different thing to believe that a defendant who is probably a spy will not pass on to the foreign power any additional information he has received.

Moreover, apart from the sense of fair play of most judges, additional safeguards could be devised which would assure that an *in camera* procedure would be used only when an unauthorized disclosure presents a substantial risk to the national security. As in the somewhat analogous situation in which the Government attempts to invoke a national security privilege in a civil action in order to trigger an *in camera* proceeding, there should "be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *United States* v. *Reynolds,* 345 U. S. 1, 7–8 (1953). Indeed, I would go even further than did the Court in *Reynolds* and lay upon trial judges the affirmative duty of assuring themselves that the national security interests claimed to justify an *in camera* proceeding are real and not merely colorable.

The Court's failure to consider the special characteristics of the *Ivanov* and *Butenko* cases is particularly surprising in the light of the reasons it gives for creating an absolute rule in favor of an automatic turnover. For the majority properly recognizes that its preference for a full adversary hearing cannot be justified by an easy reference to an absolute principle condemning *in camera* judicial decisions in all situations. Indeed, this Court has expressly authorized the use of such procedures in closely related areas involving the vindication of Fourth Amendment rights. See *Roviaro* v. *United States,* 353 U. S. 53 (1957); *McCray* v. *Illinois,* 386 U. S. 300, 309–313 (1967). If, as the Court rightly states, the propriety of an *in camera* screening procedure is a "matter of judgment," *ante,* at 182, depending on an informed consideration of all the competing factors, I do not understand why the trial judge should not be authorized to consider whether the accused simply cannot be trusted to keep the Government's records confidential. Nor do I understand why the Government must be confronted with the choice of dismissing the indictment or disclosing the information because the accused cannot be counted on to keep faith with the Court.[9] Moreover, it is not difficult to imagine cases in which the danger of unauthorized disclosure of important information would clearly outweigh the risk that an error may be made by the trial judge in determining whether a particular conversation is arguably relevant to the pending prosecution. It may well be, for example, that the number of conversations at issue is very small. Yet though the Court itself recognizes that "the need for adversary inquiry is increased by the complexity of the issues presented for adjudication," *ante,* at 184, it nevertheless leaves no room for an informed decision by the trial judge that the risk of error on the facts of a given case is insubstantial. Since the number of espionage cases is small, there is no chance whatever that these decisions will be made in a hurried fashion or that they will not be subjected to the most searching scrutiny on appeal. Of course, if any of the conversations should be found arguably relevant, their disclosure should be required before the prosecution is permitted to continue.

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[9] I would not, however, go so far as my Brother FORTAS, who would appear to require an *in camera* proceeding in any case in which the Government claims that a turnover would be prejudicial to the national security. I believe that this special procedure is

In sum, I would require the Government to turn over to Alderman and Alderisio only the records of those conversations in which each defendant participated, and I would leave the way open for a preliminary *in camera* screening procedure in the *Ivanov* and *Butenko* cases.

Mr. Justice Fortas, concurring in part and dissenting in part.

I.

In the present cases, the Court holds (1) that the Government may use evidence it obtains by unlawful electronic surveillance against any defendant who does not have "standing" to complain; (2) that a defendant has standing only if he was a party to the overheard conver-

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only justified when the accused has been indicted for his espionage activities, indicating that he has probably passed records to a foreign power.

sation or if it took place on "his premises"; [1] and (3) that all illegally obtained surveillance records as to which a defendant has standing (including national security information) must be submitted to the defendant or his counsel, subject to appropriate protective orders, and their relevance to the defendant's trial must be determined in adversary proceedings. The defendant is entitled to suppression or exclusion from his trial of such illegally obtained information and its fruits.

I find it necessary to file this separate opinion because I believe (1) that a person concerning whom an investigation involving illegal electronic surveillance has been conducted, as well as the persons given "standing" in the majority opinion, has the right to suppression of the illegally obtained material and its fruits; and (2) that it is permissible for the trial judge, subject to suitable specifications, to order that information vital to the national security shall be examined only *in camera* to determine its relevance or materiality, although I agree that all other information that may be the subject of a motion to suppress must be shown to the defendant or his counsel so that its materiality can be determined in an adversary hearing.

II.

The effect of the Court's decision, bluntly acknowledged, is to add another to the long list of cases in which the courts have tolerated governmental conduct that violates the Fourth Amendment. The courts have done this by resort to the legalism of "standing." See, *e. g.*, *Goldstein* v. *United States*, 316 U. S. 114, 121 (1942); *Wong Sun* v. *United States*, 371 U. S. 471 (1963). Cf., *United States* v. *Jeffers*, 342 U. S. 48 (1951); *Jones* v. *United States*, 362 U. S. 257 (1960); *Mancusi* v. *DeForte*, 392 U. S. 364 (1968).

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[1] The Court leaves the scope of the interest that the defendant must have in the "premises" to be determined in future litigation.

It is a fundamental principle of our constitutional scheme that government, like the individual, is bound by the law. We do not subscribe to the totalitarian principle that the Government is the law, or that it may disregard the law even in pursuit of the lawbreaker. As this Court said in *Mapp* v. *Ohio,* 367 U. S. 643, 659 (1961), "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." [2]

The Fourth Amendment to our Constitution prohibits "unreasonable" governmental interference with the fundamental facet of individual liberty: "[t]he right of the people to be secure in their persons, houses, papers, and effects." Mr. Justice Jackson recognized the central importance of the Fourth Amendment in his dissenting opinion in *Brinegar* v. *United States,* 338 U. S. 160, 180-181 (1949):

> "Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the

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[2] Mr. Justice Brandeis elaborated this point more than 40 years ago:

"In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. . . ." *Olmstead* v. *United States,* 277 U. S. 438, 485 (1928) (dissenting opinion).

See also *Elkins* v. *United States,* 364 U. S. 206, 222 (1960); *Terry* v. *Ohio,* 392 U. S. 1, 13 (1968); *Goldstein* v. *United States,* 316 U. S. 114, 128 (1942) (dissenting opinion); *Irvine* v. *California,* 347 U. S. 128, 149 (1954) (DOUGLAS, J., dissenting); Comment, The *Benanti* Case: State Wiretap Evidence and the Federal Exclusionary Rule, 57 Col. L. Rev. 1159, 1167-1168 (1957).

> individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police."

It is disquieting when an individual policeman, through carelessness or ignorance or in response to the pressure of events, seizes a person or conducts a search without compliance with the standards prescribed by law. It is even more disturbing when law enforcement officers engage in unconstitutional conduct not because of their individual error but pursuant to a calculated institutional policy and directive.

Surreptitious electronic surveillance—the "uninvited ear" as my Brother WHITE calls it—is a "search and seizure" within the ambit of the Fourth Amendment. *Silverman* v. *United States,* 365 U. S. 505, 511 (1961); *Katz* v. *United States,* 389 U. S. 347, 353 (1967). It is usually the product of calculated, official decision rather than the error of an individual agent of the state. And because by nature it is hidden, unlawful electronic surveillance is even more offensive to a free society than the unlawful search and seizure of tangible material.

In recognition of the principle that lawlessness on the part of the Government must be stoutly condemned, this Court has ruled that when such lawless conduct occurs, the Government may not profit from its fruits. *Weeks* v. *United States,* 232 U. S. 383 (1914), held that in a federal prosecution the Government may not use evidence secured through an illegal search and seizure. In *Mapp* v. *Ohio, supra,* the exclusionary rule was applied to the

States. In that case, the Court expressly recognized that only a proscription of the use of unlawfully seized material could properly implement the constitutional prohibition. It acknowledged that other remedies were not effective sanctions. *Id.*, at 651–653. See also *Weeks* v. *United States, supra,* at 393; *Irvine* v. *California,* 347 U. S. 128, 137 (1954); *Wolf* v. *Colorado,* 338 U. S. 25, 41–47 (1949) (dissenting opinion); *People* v. *Cahan,* 44 Cal. 2d 434, 282 P. 2d 905 (1955). As this Court said in *Walder* v. *United States,* 347 U. S. 62, 64–65 (1954), "The Government cannot violate the Fourth Amendment . . . and use the fruits of such unlawful conduct to secure a conviction. . . . [T]hese methods are outlawed, and convictions obtained by means of them are invalidated, because they encourage the kind of society that is obnoxious to free men."[3]

But for reasons which many commentators charge are related more to convenience and judicial prudence than to constitutional principles, courts of all States except California[4] and of the federal system, including this Court, have allowed in evidence material obtained by police agents in direct and acknowledged violation of the Fourth Amendment. They have allowed this evidence except in those cases where a defendant who moves for suppression of the material can show that his personal right of privacy was violated by the unlawful search or seizure. This restriction on persons who can suppress illegally acquired evidence has been attributed by some commentators[5] to the fact that the constitutional right to suppress was at one time considered to stem in part from the Fifth Amendment's privilege against self-incrimination.[6] Only the person whose right has been violated can claim the protection of that privilege. 8 J. Wigmore, Evidence §§ 2196, 2270 (McNaughton rev. 1961). But if the exclusionary rule follows from the Fourth Amendment itself, there is no basis for confining its invocation to persons whose right of privacy has been violated by an illegal search. The Fourth Amendment, unlike the Fifth, is couched in terms of a guarantee that the Government will not engage in unreasonable searches and seizures. It is a general prohibition, a fundamental part of the constitutional compact, the observance of which is essential to the welfare of all persons.[7] Accordingly, commentators have urged that the necessary implication of the Fourth Amendment is that any defendant against whom illegally acquired evidence is offered, whether or not it was obtained in violation of his right to privacy, may have the evidence excluded. It is also contended that this is the only means to secure the observance of the Fourth Amendment.[8]

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[3] We pointed out last Term that "[a] ruling admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which procured the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur." *Terry* v. *Ohio, supra,* n. 2, at 13. See *Irvine* v. *California, supra,* n. 2, at 150 (dissenting opinion).

[4] See *People* v. *Martin,* 45 Cal. 2d 755, 290 P. 2d 855 (1955).

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[5] Broeder, Wong Sun v. United States: A Study in Faith and Hope, 42 Neb. L. Rev. 483, 539, 540 (1963); Comment, Fruit of the Poisonous Tree—A Plea for Relevant Criteria, 115 U. Pa. L. Rev. 1136, 1140–1141 (1967). Others have attributed the standing requirement simply to a hostility towards the exclusionary rule on the part of the courts. See, *e. g.*, Edwards, Standing to Suppress Unreasonably Seized Evidence, 47 Nw. U. L. Rev. 471 (1952).

[6] *Mapp* v. *Ohio,* 367 U. S. 643 (1961), was a 5-to-4 decision. My Brother BLACK concurred only on the basis that the Fifth Amendment's ban against self-incrimination, operating in conjunction with the Fourth Amendment, required the exclusionary rule. See also *Ker* v. *California,* 374 U. S. 23, 30 (1963); *Malloy* v. *Hogan,* 378 U. S. 1, 8 (1964).

[7] The California Supreme Court has recognized that it is not inconsistent to hold that any person may object to the use against him of evidence obtained by an illegal search or seizure, while at the same time allowing only a person who has been made to incriminate himself to suppress his confession and its fruits. Compare *People* v. *Martin, supra,* n. 4, with *People* v. *Varnum,* 66 Cal. 2d 808, 427 P. 2d 772 (1967).

I find these arguments cogent and appealing. The Fourth Amendment is not merely a privilege accorded to him whose domain has been lawlessly invaded. It grants the individual a personal right, not to privacy, but to insist that the state utilize only lawful means of proceeding against him. And it is an assurance to all that the Government will exercise its formidable powers to arrest and to investigate only subject to the rule of law. See *Brinegar* v. *United States, supra,* at 181 (dissenting opinion).

To allow anyone, regardless of "standing," to prevent the use against him of evidence that the Government has lawlessly obtained would, however, be contrary to a number of decisions stemming from *Jones* v. *United States, supra. E. g., Wong Sun* v. *United States, supra; Parman* v. *United States,* 130 U. S. App. D. C. 188, 399 F. 2d 559 (1968). It is the mandate of *Jones* that something more than the generalized interest of any citizen in governmental obedience to law may be required for suppression of unlawfully obtained evidence. But if the Court is not prepared to repudiate the holding, stated in *Jones,* that something more must be shown to compel suppression than a claim of prejudice based only on "the use of evidence gathered as a consequence of a search or seizure directed at someone else," 362 U. S., at 261, it should at least follow *Jones* faithfully and completely.

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[8] See generally Grant, Circumventing the Fourth Amendment, 14 So. Cal. L. Rev. 359, 368 (1941); Allen, The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties, 45 Ill. L. Rev. 1, 22 (1950); Kamisar, Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure, 1961 U. Ill. L. F. 78, 105. Traynor, Mapp v. Ohio at Large in the Fifty States, 1962 Duke L. J. 319, 335; Broeder, *supra,* n. 5, at 540; Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 Calif. L. Rev. 579, 649–650, n. 352 (1968); Comment, Judicial Control of Illegal Search and Seizure, 58 Yale L. J. 144, 157 (1948); Note, Standing to Object to an Unlawful Search and Seizure, 1965 Wash. U. L. Q. 488; Comment, Standing to Object to an Unreasonable Search and Seizure, 34 U. Chi. L. Rev. 342 (1967). But see Edwards, *supra,* n. 5, at 472; Weeks, Standing to Object in the Field of Search and Seizure, 6 Ariz. L. Rev. 65 (1964); Comment, 55 Mich. L. Rev. 567, 581 (1957).

Jones represented a substantial step towards full implementation of the Fourth Amendment. The case involved a charge of illegal possession of narcotics, and it held that mere lawful presence on the premises searched gave "standing" to challenge the legality of the search.[9] It rejected the view "generally" held by courts of appeals "that the movant [must] claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched" in order to have the seized property suppressed. *Ibid.* It explicitly rejected the use of property concepts to determine whether the movant had the necessary "interest" or "standing" to obtain exclusion of the unlawfully seized evidence. See *id.,* at 266.

The Court said in *Jones,* in a passage the majority quotes but the full scope of which it does not incorporate in its opinion:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, *one against whom the search was directed,* as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. . . .
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> . . . . .

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[9] I assume that the Court today intends to incorporate at least this direct holding of *Jones*.

> "Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy." (Emphasis supplied.) *Id.*, at 261.

It is my position that this quotation, read in light of the Court's rejection of property concepts, requires that we include within the category of those who may object to the introduction of illegal evidence "one against whom the search was directed." Such a person is surely "the victim of an invasion of privacy"[10] and a "person aggrieved," even though it is not his property that was searched or seized. As I think the Court recognized in *Jones,* unless we are to insist upon property concepts, it is enough to give him "standing" to object that the government agents conducted their unlawful search and seizure in order to obtain evidence to use against him. The Government violates his rights when it seeks to deprive him of his liberty by unlawfully seizing evidence in the course of an investigation of him and using it against him at trial. See *Rosencranz* v. *United States,* 334 F. 2d 738, 741 (C. A. 1st Cir. 1964) (concurring opinion).

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[10] Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 211, provides that a law enforcement officer seeking prior judicial authorization for interception of wire or oral communications shall include, among other things, in his application to the court "a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted . . . ." 82 Stat. 218 (18 U. S. C. § 2518 (1)(b) (1964 ed., Supp. IV)). Examination of such applications should facilitate the task of deciding at whom a particular investigation was directed. See also *Berger* v. *New York,* 388 U. S. 41, 55-59 (1967), in which we held that the Fourth Amendment requires, as a precondition of judicial authorization of an eavesdrop, that the conversations sought to be seized be described with particularity.

Although I have referred to relevant provisions of the Omnibus Crime Control and Safe Streets Act, I note that I have not considered the constitutionality of the Act, as that issue is not involved in this case. I express neither agreement nor disagreement with the majority's statements concerning the Act.

III.

I do not agree with the Court's decision that sensitive national security material that may not be relevant to a defendant's prosecution must be turned over to the defendant or his counsel for their scrutiny. By the term "national security material," I mean to refer to a rigid and limited category. It would not include material relating to any activities except those specifically directed to acts of sabotage, espionage, or aggression by or on behalf of foreign states.

Because the Court believes that no distinction can be made with respect to the defendant's right to suppress relevant evidence on the basis of the sensitivity of the material, it has concluded that no distinction can be made as to the method of determining whether the material is relevant. I agree that an *in camera* inspection of the records of unlawful surveillance should not be the usual method of determining relevance. I agree with all that the Court says about the inadequacy of an inspection in which the defendant cannot participate and the burden that it places upon the trial judge. But in cases where the trial court explicitly determines, in written findings, sealed and available for examination by reviewing courts, that disclosure would substantially injure national security interests, I do not think that disclosure to the defendant is necessary in order for the Government to proceed with a prosecution. The trial judge should make such findings only when the Attorney General has personally certified that specific portions of the unlawfully obtained materials are so sensitive that they should not be disclosed. But when such a certification is made, I believe that the trial judge may himself weed out the material that he deems to be clearly irrelevant and immaterial. The balance, of course, must be turned over to the defendant or his counsel, unless the Government chooses instead to dismiss the prosecution.

Let me emphasize that the defendant's right to suppress is the same whether the charge is espionage, sabotage, or another kind of crime: Relevant material that has been illegally seized may be suppressed if the defendant has standing, but the existence of nonrelevant illegal evidence will not prevent a prosecution. Only the method of determining the relevance of the lawlessly obtained material to the prosecution would vary according to whether the national security is involved.

I agree with the majority that the possibility of error in determining relevance is much greater if there is only *in camera* examination. But I also agree with my Brother HARLAN that disclosure of some of the material may pose a serious danger to the national interest. I therefore reach the conclusion that a differentiation may properly be made between the method of handling materials the disclosure of which would endanger the national security and other illegally obtained materials. Skepticism as to the court's ability to detect and turn over to the defendant all relevant material may be well founded, but *in camera* inspection does not so clearly threaten to deprive defendants of their constitutional rights that it justifies endangering the national security. Accordingly, I would hold that after certification by the Attorney General that specific portions of unlawfully obtained materials are sensitive, the trial judge may find that their disclosure to the defendant or his counsel would substantially injure national security interests, and he may determine *in camera* whether the materials are arguably relevant to the defendant's prosecution.

DUNBAR-STANLEY STUDIOS, INC. *v.* CITY OF MOBILE.

APPEAL FROM THE SUPREME COURT OF ALABAMA.

No. 377. Decided March 10, 1969.

282 Ala. 386, 211 So. 2d 803, appeal dismissed and certiorari denied.

J. Edward Thornton and *Glen B. Hardymon* for appellant.

Barry Hess for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

POWERS ET AL. *v.* PERRY CIRCUIT COURT ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA.

No. 559, Misc. Decided March 10, 1969.

Certiorari granted; vacated and remanded.

John J. Dillon, Attorney General of Indiana, and *Richard V. Bennett,* Deputy Attorney General, for respondents.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Indiana for further consideration in light of *Smith* v. *Hooey,* 393 U. S. 374.

LOCAL 182, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* NATIONAL LABOR RELATIONS BOARD.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 958. Decided March 10, 1969.

401 F. 2d 509, appeal dismissed and certiorari denied.

John T. Buckley for appellant.

Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, and *Norton J. Come* for appellee.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

ABRAMS ET AL. *v.* WIETHE ET AL.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 961. Decided March 10, 1969.

Appeal dismissed and certiorari denied.

Charles E. Hamilton for appellants.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

SHAW *v.* ILLINOIS.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

No. 665, Misc. Decided March 10, 1969.

Certiorari granted; 89 Ill. App. 2d 285, 233 N. E. 2d 73, vacated and remanded.

Gerald W. Getty and *Marshall J. Hartman* for petitioner.

William G. Clark, Attorney General of Illinois, and *John J. O'Toole,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Appellate Court of Illinois, First District, for further consideration in light of *Smith* v. *Illinois,* 390 U. S. 129.

MR. JUSTICE BLACK and MR. JUSTICE WHITE are of the opinion that certiorari should be denied.

WATTS *v.* MARYLAND.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 1267, Misc. Decided March 10, 1969.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

JONES *v.* CALIFORNIA.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT.

No. 1072, Misc. Decided March 10, 1969.

263 Cal. App. 2d 818, 70 Cal. Rptr. 13, appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

SUMRALL *v.* KIDD ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

No. 1167, Misc. Decided March 10, 1969.

Vacated and remanded.

Lawrence A. Aschenbrenner and *Elliott C. Lichtman* for appellant.

Acting Solicitor General Friedman, Acting Assistant Attorney General Eardley, Morton Hollander, and *Robert V. Zener* for appellees.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted. The judgment of the District Court is vacated and the cause is remanded in order that the District Court may enter a fresh decree from which the appellant may, if he wishes, perfect a timely appeal to the Court of Appeals. *Moody* v. *Flowers,* 387 U. S. 97.

JOHNSON *v.* VOYLES, SHERIFF, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS.

No. 429, Misc. Decided March 10, 1969.

Certiorari granted; vacated and remanded.

Crawford C. Martin, Attorney General of Texas, *Nola White*, First Assistant Attorney General, *Robert C. Flowers* and *Allo B. Crow, Jr.*, Assistant Attorneys General, and *Stanley Kirk* for respondents.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Texas for further consideration in light of *Smith* v. *Hooey*, 393 U. S. 374.

KAUFMAN *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 53. Argued November 19, 1968.—Decided March 24, 1969.

Petitioner was tried and convicted of a federal crime. His only defense was insanity. After his conviction was upheld on appeal, petitioner sought post-conviction relief under 28 U. S. C. § 2255, and included a claim that the finding of sanity was based upon the improper admission of illegally seized evidence. The District Court after an evidentiary hearing denied relief. Petitioner's applications to the District Court and the Court of Appeals for leave to appeal *in forma pauperis* were denied, both courts adhering to the view followed by the Court of Appeals that unlawful search-and-seizure claims "are not proper matters to be presented by a motion to vacate sentence under § 2255 but can only be properly presented by appeal from the conviction." *Held:* A claim of unconstitutional search and seizure is cognizable in a proceeding under 28 U. S. C. § 2255. Pp. 221–231.

(a) Unconstitutional restraints "may be challenged on federal habeas corpus even though imposed pursuant to the conviction of a federal court of competent jurisdiction," *Fay* v. *Noia,* 372 U. S. 391, 409 (1963), and the same principle applies in a proceeding under § 2255, which revised the post-conviction procedure for federal prisoners but did not reduce the scope of habeas corpus relief. Pp. 221–222.

(b) Post-conviction relief for prisoners' *constitutional* claims is not limited by the rule that collateral review is not available to correct errors of law. P. 223.

(c) Federal post-conviction relief is available to both state and federal prisoners to protect constitutional rights relating to the criminal trial process (including the right of a defendant not to have unconstitutionally obtained evidence admitted against him at trial), and the circumstances under which a federal court must review constitutional claims of federal prisoners in a § 2255 proceeding are the same as those requiring habeas corpus review of constitutional claims of state prisoners, see *Townsend* v. *Sain,* 372 U. S. 293, 313 (1963), except that a § 2255 court need not be concerned with the adequacy of the underlying federal rules of procedure. Pp. 225–227.

(d) Considerations of finality of litigation have no greater weight with respect to federal prisoners seeking § 2255 relief than with respect to state prisoners seeking federal habeas corpus relief. P. 228.

(e) Petitioner's insanity defense, like any other defense, cannot be prejudiced by the admission of illegally seized evidence. P. 230.

Reversed and remanded.

Bruce R. Jacob, by appointment of the Court, 391 U. S. 901, argued the cause and filed briefs for petitioner.

John S. Martin, Jr., argued the cause for the United States. On the brief were *Solicitor General Griswold, Assistant Attorney General Vinson*, and *Beatrice Rosenberg*.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question here is whether the claim of a federal prisoner that he was convicted on evidence obtained in an unconstitutional search and seizure is cognizable in a post-conviction proceeding under 28 U. S. C. § 2255.[1]

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[1] The pertinent provisions of 28 U. S. C. § 2255 are:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the . . . sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner

Petitioner was tried and convicted in the District Court for the Eastern District of Missouri on charges of armed robbery of a federally insured savings and loan association. At trial, petitioner's only defense was insanity. The Court of Appeals for the Eighth Circuit, on petitioner's direct appeal, affirmed the conviction. *Kaufman* v. *United States,* 350 F. 2d 408 (1965).

Petitioner then filed this post-conviction proceeding under § 2255 and included a claim that the finding of sanity was based upon the improper admission of unlawfully seized evidence.[2] After an evidentiary hearing, the District Judge, who had also presided at petitioner's trial, denied relief with a written opinion. As respects the claim of unlawful search and seizure, the opinion states that: "The record does not substantiate this claim. In any event, this matter was not assigned as error on Kaufman's appeal from conviction and is not available as a ground for collateral attack on the instant § 2255 motion." 268 F. Supp. 484, 487 (1967). Petitioner's applications to the District Court and the Court of Appeals for the Eighth Circuit for leave to appeal *in forma pauperis* were denied.

We treat the actions of the District Court and the Court of Appeals as grounded on the view consistently

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as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."

[2] Petitioner initiated the § 2255 proceeding by a *pro se* motion. The only claim presented was denial of effective assistance of counsel. The District Judge ordered a hearing, and appointed counsel to assist petitioner. Counsel filed a supplemental motion presenting two additional claims, one of which was that the search of petitioner's automobile was illegal.

followed by the Court of Appeals that claims of unlawful search and seizure "are not proper matters to be presented by a motion to vacate sentence under § 2255 but can only be properly presented by appeal from the conviction."[3] Other courts of appeals have indicated a contrary view.[4] In light of the importance of the issue in the administration of § 2255 we granted certiorari. 390 U. S. 1002 (1968). We reverse.

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[3] *Warren* v. *United States,* 311 F. 2d 673, 675 (1963); see also *Springer* v. *United States,* 340 F. 2d 950 (1965); *Peters* v. *United States,* 312 F. 2d 481 (1963); *Gendron* v. *United States,* 340 F. 2d 601 (1965). Accord: *United States* v. *Re,* 372 F. 2d 641 (C. A. 2d Cir. 1967); *United States* v. *Jenkins,* 281 F. 2d 193 (C. A. 3d Cir. 1960); *Armstead* v. *United States,* 318 F. 2d 725 (C. A. 5th Cir. 1963); *Eisner* v. *United States,* 351 F. 2d 55 (C. A. 6th Cir. 1965); *De Welles* v. *United States,* 372 F. 2d 67 (C. A. 7th Cir. 1967); *Williams* v. *United States,* 307 F. 2d 366 (C. A. 9th Cir. 1962).

We have not overlooked that the District Court's statement that "this matter was not assigned as error on Kaufman's appeal from conviction . . ." suggests that in any event failure to appeal the conviction renders the § 2255 remedy unavailable. This suggestion is contrary to our decisions that failure to take a direct appeal from conviction does not deprive a federal post-conviction court of power to adjudicate the merits of constitutional claims; the question rather is whether the case is one in which refusal to exercise that power would be appropriate. See *Fay* v. *Noia,* 372 U. S. 391, 438–440 (1963); *Henry* v. *Mississippi,* 379 U. S. 443, 451–452 (1965).

This certainly is not a case where there was a "deliberate by-pass" of a direct appeal. Appointed counsel had objected at trial to the admission of certain evidence on grounds of unlawful search and seizure, but newly appointed appellate counsel did not assign the admission as error either in his brief or on oral argument of the appeal. After oral argument of the appeal, however, petitioner wrote a letter to appellate counsel asking him to submit to the Court of Appeals a claim of illegal search and seizure of items from his automobile. Counsel forwarded petitioner's letter to the Clerk of the Court of Appeals who notified counsel that petitioner's letter had been given to the panel which had heard and was considering the appeal. The opinion of the Court of Appeals affirming petitioner's conviction does not appear to pass on the search-and-seizure claim.

The authority of the federal courts to issue the writ of habeas corpus was incorporated in the very first grant of federal court jurisdiction made by the Judiciary Act of 1789, c. 20, § 14, 1 Stat. 81, with the limiting provision that "writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States . . . ." Common-law principles initially determined the scope of the writ. *Ex parte Bollman,* 4 Cranch 75, 93–94 (1807). In 1867, however, the writ was extended to state prisoners, and its scope was expanded to authorize relief, both as to federal and state prisoners, in "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . . ." Act of February 5, 1867, c. 28, § 1, 14 Stat. 385.

Section 2255 revised the procedure by which federal prisoners are to seek such relief but did not in any respect cut back the scope of the writ. The section was included in the 1948 revision of the Judicial Code "at the instance of the Judicial Conference [of the United States] to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts. Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings *by affording the same rights in another and more convenient forum," United States* v.

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[4] *United States* v. *Sutton,* 321 F. 2d 221 (C. A. 4th Cir. 1963); *Gaitan* v. *United States,* 317 F. 2d 494 (C. A. 10th Cir. 1963).

Hayman, 342 U. S. 205, 219 (1952) (italics supplied);[5] "the legislation was intended simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined." *Hill* v. *United States*, 368 U. S. 424, 427 (1962). Thus, we may refer to our decisions respecting the availability of the federal habeas remedy in deciding the question presented in this case.

We noted in *Fay* v. *Noia*, 372 U. S. 391, 409 (1963) that "[t]he course of decisions of this Court . . . makes plain that restraints contrary to our fundamental law, the Constitution, may be challenged on federal habeas even though imposed pursuant to the conviction of a federal court of competent jurisdiction."[6] We have given the same recognition to constitutional claims in § 2255 proceedings. See, *e. g., United States* v. *Hayman, supra; Sanders* v. *United States*, 373 U. S. 1 (1963); *Jordan* v. *United States*, 352 U. S. 904 (1956). The courts of appeals which have denied cognizance under § 2255 to unconstitutional search-and-seizure claims have not generally supplied reasons supporting their apparent departure from this course of our decisions. Rather, these courts have made the bald statement, variously expressed, that a motion under § 2255 cannot be used in lieu of an appeal.[7] It is true that in *Sunal* v. *Large,* 332 U. S. 174, 179 (1947), we held that "the writ is not designed for collateral review of errors of law committed by the trial court—the existence of any evidence to support the conviction, irregularities in the grand jury procedure, departure from a statutory grant of time in which to prepare for trial, and other errors in trial procedure which do not cross the jurisdictional line." But we there recognized that federal habeas relief for *constitutional* claims asserted by federal prisoners is not limited by that rule. 332 U. S., at 182; see also *Hill* v. *United States, supra,* at 428. Later, in *Townsend* v. *Sain,* 372 U. S. 293, 311–312 (1963), we pointed out the vital distinction between the appellate and habeas functions and concluded that habeas relief cannot be denied solely on the ground that relief should have been sought by appeal to prisoners alleging constitutional deprivations:

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[5] Among the serious administrative problems under habeas corpus practice in the case of federal prisoners was that created by the requirement that the action be brought in the district of confinement, where the records of the case were often not readily available. Section 2255 changed this to require an application by motion filed in the sentencing court. See *United States* v. *Hayman*, 342 U. S. 205, 212–219 (1952).

[6] See, *e. g., Ex parte Lange*, 18 Wall. 163 (1874); *Ex parte Wilson*, 114 U. S. 417 (1885); *Callan* v. *Wilson*, 127 U. S. 540 (1888); *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892); *Johnson* v. *Zerbst*, 304 U. S. 458 (1938); *Bowen* v. *Johnston*, 306 U. S. 19 (1939); *Waley* v. *Johnston*, 316 U. S. 101 (1942); *Von Moltke* v. *Gillies*, 332 U. S. 708 (1948); see also cases collected in *Fay* v. *Noia*, 372 U. S. 391, 409, n. 17.

> "The whole history of the writ—its unique development—refutes a construction of the federal courts'

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[7] See, *e. g.,* "A motion under § 2255 cannot be made the substitute for an appeal," *Peters* v. *United States, supra,* n. 3, at 482 (C. A. 8th Cir.); "Section 2255 provides for a collateral attack on a judgment of conviction and is not a substitute for appeal for alleged errors committed at the trial," *Eisner* v. *United States, supra,* n. 3, at 57 (C. A. 6th Cir.); "Questions concerning the admissibility of evidence obtained directly or indirectly as a result of an unlawful search can be reviewed on an appeal from a judgment of conviction, but cannot be dealt with in a section 2255 proceeding," *Williams* v. *United States, supra,* n. 3, at 367 (C. A. 9th Cir.); "It has long been the law that habeas corpus and § 2255 will not be allowed to do service as an appeal, and that so far as federal prisoners are concerned, failure to appeal will normally bar resort to post-conviction relief," *Nash* v. *United States,* 342 F. 2d 366, 367 (C. A. 5th Cir. 1965). These paraphrase the statement in *Sunal* v. *Large,* 332 U. S. 174, 178 (1947), that "the writ of *habeas corpus* will not be allowed to do service for an appeal," but that statement was made in the context of an alleged nonconstitutional trial error. See *United States* v. *Sobell,* 314 F. 2d 314, 322–323 (C. A. 2d Cir. 1963).

> habeas corpus powers that would assimilate their task to that of courts of appellate review. The function on habeas is different. It is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the very gravest allegations. . . . The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary. Therefore, where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew."

The Government suggests another rationale for denying post-conviction relief to federal prisoners with illegal search-and-seizure claims. The denial of Fourth Amendment protection against unreasonable searches and seizures, the Government's argument runs, is of a different nature from denials of other constitutional rights which we have held subject to collateral attack by federal prisoners. For unlike a claim of denial of effective counsel or of violation of the privilege against self-incrimination, as examples, a claim of illegal search and seizure does not impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable; rather, the exclusion of illegally seized evidence is simply a prophylactic device intended generally to deter Fourth Amendment violations by law enforcement officers. This deterrent function, the Government argues, is adequately served by the opportunities afforded a federal defendant to enforce the exclusionary rule before or at trial, so that the relatively minimal additional deterrence afforded by a post-conviction remedy would not seem to justify, except in special circumstances, the collateral release of guilty persons who did not raise the search-and-seizure issue at trial or on direct appeal. In sum, the Government sponsors adoption by this Court of the rule announced in the majority opinion of the Court of Appeals for the District of Columbia Circuit in *Thornton* v. *United States,* 125 U. S. App. D. C. 114, 116, 368 F. 2d 822, 824 (1966), that in the absence of a showing of "special circumstances" a claim by a federal prisoner that evidence admitted at his trial was the fruit of an unconstitutional search or seizure is not properly the ground of a collateral attack on his conviction.

The Government concedes in its brief that we have already rejected this approach with respect to the availability of the federal habeas corpus remedy to state prisoners. This rejection was premised in large part on a recognition that the availability of collateral remedies is necessary to insure the integrity of proceedings at and before trial where constitutional rights are at stake. Our decisions leave no doubt that the federal habeas remedy extends to state prisoners alleging that unconstitutionally obtained evidence was admitted against them at trial. See, *e. g., Mancusi* v. *DeForte,* 392 U. S. 364 (1968); *Carafas* v. *LaVallee,* 391 U. S. 234 (1968); *Warden* v. *Hayden,* 387 U. S. 294 (1967); see also *Henry* v. *Mississippi,* 379 U. S. 443, 452 (1965). The Government argues, however, that federal post-conviction relief should not be available to federal prisoners in as broad a range of cases as that cognizable when presented by state prisoners. Support for this proposition is drawn from the fact that considerations which this Court, in *Fay* v. *Noia, supra,* deemed justifications for affording a federal forum to state prisoners—*e. g.,* the necessity that federal courts have the "last say" with respect to questions of federal law, the inadequacy of state procedures to raise and preserve federal claims, the concern that state judges may be unsympathetic to federally created rights, the institutional constraints on the exercise of this Court's certiorari jurisdiction to review state convictions—do not obtain with respect to federal prisoners. Thus, we are told that the federal prisoner, having already had his day in federal court, stands in a different position with regard to federal collateral remedies than does the state prisoner. Conceding this distinction, we are unable to understand why it should lead us to restrict, completely or severely, access by federal prisoners with illegal search-and-seizure claims to federal collateral remedies, while placing no similar restriction on access by state prisoners.

The opportunity to assert federal rights in a federal forum is clearly not the sole justification for federal post-conviction relief; otherwise there would be no need to make such relief available to federal prisoners at all. The provision of federal collateral remedies rests more fundamentally upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief. This is no less true for federal prisoners than it is for state prisoners.

In *Townsend* v. *Sain, supra,* at 313, 318, we set down the circumstances under which a federal court must review constitutional claims—including, of course, claims of illegal search and seizure—presented by state prisoners:

> "If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.
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> * * * * *

> "In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge."

Of these, only the duty of the federal habeas court to scrutinize "the fact-finding procedure" under (3) does not apply in the case of a federal prisoner; federal fact-finding procedures are by hypothesis adequate to assure the integrity of the underlying constitutional rights. Thus, when a request for relief under § 2255 asserts a claim of unconstitutional search and seizure which was tested by a motion to suppress at or before trial under Fed. Rule Crim. Proc. 41 (e), the § 2255 court need not stop to review the adequacy of the procedure established by that Rule. In this respect, and in this respect only, the position of the federal prisoner does differ from that of the state prisoner. We perceive no differences between the situations of state and federal prisoners which should make allegations of the other circumstances listed in *Townsend* v. *Sain* less subject to scrutiny by a § 2255 court.[8]

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[8] Where a trial or appellate court has determined the federal prisoner's claim, discretion may in a proper case be exercised against the grant of a § 2255 hearing. Section 2255 provides for hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief . . . ." In *Sanders* v. *United States,* 373 U. S. 1 (1963), we announced standards governing the determination whether a hearing should be ordered in the case of a successive motion under § 2255. Similarly, where the trial or appellate court has had a "say" on a federal prisoner's claim, it may be open to the § 2255 court to determine that on the basis of the motion, files, and records, "the prisoner is entitled to no relief." See *Thornton* v. *United States,* 125 U. S. App. D. C. 114, 125, 368 F. 2d 822, 833 (1966) (dissenting opinion of Wright, J.).

Furthermore, the § 2255 court may in a proper case deny relief to a federal prisoner who has deliberately bypassed the orderly federal procedures provided at or before trial and by way of appeal—*e. g.,* motion to suppress under Fed. Rule Crim. Proc. 41 (e) or appeal under Fed. Rule App. Proc. 4 (b). *Fay* v. *Noia, supra,* n. 3, at 438; *Henry* v. *Mississippi, supra,* n. 3, at 451–452.

The approach adopted by the court in *Thornton* and pressed upon us here exalts the value of finality in criminal judgments at the expense of the interest of each prisoner in the vindication of his constitutional rights. Such regard for the benefits of finality runs contrary to the most basic precepts of our system of post-conviction relief. In *Fay* v. *Noia, supra,* at 424, a case involving a state prisoner who claimed that his confession was coerced, we said that "conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." The same view was expressed in *Sanders* v. *United States, supra,* at 8, a case involving a federal prisoner: "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." This philosophy inheres in our recognition of state prisoners' post-conviction claims of illegal search and seizure. Plainly the interest in finality is the same with regard to both federal and state prisoners. With regard to both, Congress has determined that the full protection of their constitutional rights requires the availability of a mechanism for collateral attack. The right then is not merely to a federal forum but to full and fair consideration of constitutional claims. Federal prisoners are no less entitled to such consideration than are state prisoners. There is no reason to treat federal trial errors as less destructive of constitutional guarantees than state trial errors, nor to give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants. To hold otherwise would reflect an anomalous and erroneous view of federal-state relations.

We cannot agree with the suggestion in MR. JUSTICE BLACK's dissent that the weight to be accorded the benefits of finality is as controlling in the context of post-conviction relief as in the context of retroactive relief. The availability of post-conviction relief serves significantly to secure the integrity of proceedings at or before trial and on appeal. No such service is performed by extending rights retroactively. Thus, collateral relief, unlike retroactive relief, contributes to the present vitality of all constitutional rights whether or not they bear on the integrity of the fact-finding process.

More fundamentally, the logic of his dissent cannot be limited to the availability of post-conviction relief. It brings into question the propriety of the exclusionary rule itself. The application of that rule is not made to turn on the existence of a possibility of innocence; rather, exclusion of illegally obtained evidence is deemed necessary to protect the right of all citizens, not merely the citizen on trial, to be secure against unreasonable searches and seizures. As we said in *Miller* v. *United States,* 357 U. S. 301, 313 (1958):

> "We are duly mindful of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law. But insistence on observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end. However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness. . . . Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house."

Finally, MR. JUSTICE BLACK's reliance on petitioner's concession of participation in the robbery is misplaced.

That concession is irrelevant in light of petitioner's defense at trial based on insanity. Surely that defense, any more than any other defense, cannot be prejudiced by the admission of unconstitutionally seized evidence.

We thus reject the rule announced in the majority opinion in *Thornton* and adopt the reasoning of Judge Wright's dissent in that case, 125 U. S. App. D. C., at 123, 368 F. 2d, at 831:

> "There is undoubtedly a difference in the way federal courts should treat post-conviction applications by state and federal prisoners. Brown v. Allen, [344 U. S. 443, 508], 73 S. Ct. 397 (opinion of Mr. Justice Frankfurter), interprets 28 U. S. C. § 2241 as requiring federal courts to have the 'last say' with respect to questions of federal law. Federal prisoners applying for collateral relief often have had their constitutional claims passed on by federal courts at trial or on appeal, so the Brown v. Allen rationale for federal court relitigation is inapposite. But this difference provides no basis for limiting the grounds upon which federal prisoners may obtain collateral relief, or for formulating a separate set of rules to determine when a federal prisoner's claim has adequately been adjudicated. Where a federal trial or appellate court has had a 'say' on a federal prisoner's claim, there may be no need for collateral relitigation. But what if the federal trial or appellate court said nothing because the issue was not raised? What if it is unclear whether the 'say' was on the merits? What if new law has been made or facts uncovered relating to the constitutional claim since the trial and appeal? What if the trial or appellate court based its rulings on findings of fact made after a hearing not 'full and fair' within the meaning of Townsend v. Sain, 372 U. S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963)?

> All these problems are common to state and federal prisoners, and the interest in finality operates equally in both situations. These problems raise, not the issue whether relitigation is necessary, but whether one adequate litigation has been afforded. It would be anomalous indeed, especially in light of the interest in maintaining good federal-state relations, if defaults not precluding one adequate federal review for the constitutional claims of state prisoners precluded such a review for federal prisoners, or if defects rendering state court adjudications inadequate did not similarly affect federal court adjudications."

We therefore hold that a claim of unconstitutional search and seizure is cognizable in a § 2255 proceeding. The order of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, dissenting.

Petitioner Kaufman was convicted of robbing a federally insured savings and loan association while armed with a pistol. Part of the evidence used against him was a revolver, some of the stolen traveler's checks, a money-order receipt, a traffic summons, and gasoline receipts. During the trial petitioner's counsel conceded that petitioner had committed the robbery but contended he was not responsible for the crime because he was mentally ill at the time. An appeal from his conviction was rejected by the Court of Appeals, 350 F. 2d 408 (C. A. 8th Cir. 1965), and we denied certiorari, 383 U. S. 951 (1966). Three months later—after the decision had become what is generally considered "final"—he filed in the Federal District Court the present motion under 28 U. S. C. § 2255, asking that his sentence be vacated on the ground, among others, that the trial court had committed error in not suppressing the evidence against him because the articles had been obtained by an unlawful search and seizure. Despite the fact that he has never, either in his trial or in this proceeding, asserted that he had not actually physically committed the robbery with a pistol, and despite the fact that this plainly reliable evidence clearly shows, along with the other evidence at trial, that he was not insane, the Court is reversing his case, holding that he can collaterally attack the judgment after it had become final. I dissent.

My dissent rests on my belief that not every conviction based in part on a denial of a constitutional right is subject to attack by habeas corpus or § 2255 proceedings after a conviction has become final. This conclusion is supported by the language of § 2255 which clearly suggests that not every constitutional claim is intended to be a basis for collateral relief.[1] And, as this Court has said in *Fay* v. *Noia,* with reference to habeas corpus,

> "Discretion is implicit in the statutory command that the judge . . . 'dispose of the matter as law and justice require,' 28 U. S. C. § 2243 . . . ." 372 U. S. 391, 438.

Of course one important factor that would relate to whether the conviction should be vulnerable to collateral attack is the possibility of the applicant's innocence. For illustration, few would think that justice requires release of a person whose allegations clearly show that he was guilty of the crime of which he had been convicted.

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[1] "If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been *such a denial* or infringement of the constitutional rights of the prisoner *as to render the judgment vulnerable to collateral attack,* the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U. S. C. § 2255. (Emphasis supplied.)

I agree with the Court's conclusion that the scope of collateral attack is substantially the same in federal habeas corpus cases which involve challenges to state convictions, as it is in § 2255 cases which involve challenges to federal convictions. The crucial question, however, is whether certain types of claims, such as a claim to keep out relevant and trustworthy evidence because the result of an unconstitutional search and seizure, should normally be open in these collateral proceedings. This question was fully and carefully considered by the Court of Appeals for the District of Columbia Circuit in *Thornton* v. *United States,* 125 U. S. App. D. C. 114, 368 F. 2d 822 (1966), and I agree substantially with the opinion of Judge Leventhal for the majority of that court, which states:[2]

> "[G]enerally a claim by a federal prisoner that evidence admitted at his trial was the fruit of an unconstitutional search or seizure is not properly the ground of a collateral attack on his conviction. As further noted below, this rule is subject to an exception for special circumstances . . . .
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> . . . . .
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> "Many opinions declare that collateral attack, as by habeas corpus, is available to correct the denial of a constitutional right. This is the general rule but it is not an absolute. . . .
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> "The courts are called on to evolve and provide procedures and remedies that are effective to vindicate constitutional rights. However, where effective procedures are available in the direct proceeding, there

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[2] 125 U. S. App. D. C., at 116–118, 368 F. 2d, at 824–826.

> is no imperative to provide an additional, collateral review, leaving no stone unturned, when exploration of all avenues of justice at the behest of individual petitioners may impair judicial administration of the federal courts, as by making criminal litigation interminable, and diverting resources of the federal judiciary."

It was formerly the rule in this country that judgments were so impervious to collateral attack that a defendant could not collaterally attack his conviction even after the Government had admitted his innocence. That rule, obviously a harsh and what might seem to most people an indefensible one, has of course now been abandoned. It was finally put to rest in *Fay* v. *Noia,* 372 U. S. 391 (1963). It is this element of probable or possible innocence that I think should be given weight in determining whether a judgment after conviction and appeal and affirmance should be open to collateral attack, for the great historic role of the writ of habeas corpus has been to insure the reliability of the guilt-determining process.[3] In *Fay* v. *Noia,* Noia and his two codefendants had been convicted of felony murder in New York state court and each had been sentenced to life imprisonment. The sole evidence against each defendant was his confession. While his codefendants appealed, Noia did not, for fear that if he secured a reversal and was reconvicted at a second trial, he would be sentenced to death. The confessions of one codefendant were subsequently found by the Court of Appeals for the Second Circuit to have been coerced by practices which that court described as "satanic." *United States ex rel. Caminito* v. *Murphy,* 222 F. 2d 698,

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[3] See Mishkin, The Supreme Court, 1964 Term—Foreword: The High Court, The Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56, 79–86 (1965).

701 (1955). The conviction of Noia's other codefendant was also reversed, *People* v. *Bonino*, 1 N. Y. 2d 752, 135 N. E. 2d 51, and since there was no evidence other than the coerced confessions that they were guilty, the State apparently declined to reprosecute them and they were set free. See *United States ex rel. Noia* v. *Fay*, 183 F. Supp. 222, 227, n. 6 (1960). Noia, however, languished in prison, even though his alleged confederates had been released. Both the New York courts and the Federal District Court declined to review his case on the ground that his 1942 failure to appeal made his conviction "final." He remained in jail despite the fact that he "continuously asserted his innocence of the crime for which he [had] been convicted" in his petition for habeas corpus and elsewhere. See Transcript of Record in No. 84, October Term, 1962, p. 8.

It was under these circumstances, strongly appealing to the Court's sense of what justice required, that this Court held that Noia was entitled to challenge his conviction even though it had previously become "final." My Brother HARLAN, dissenting, concluded that no matter how appealing the circumstances, one wrongly convicted must be consigned to the slow, tedious, and uncertain road to whatever relief he might possibly get from the Chief Executive. On the contrary, I agreed with *Fay* v. *Noia* as one of the bright landmarks in the administration of criminal justice. But I did not think then and do not think now that it laid down an inflexible rule compelling the courts to release every prisoner who alleges in collateral proceedings some constitutional flaw, regardless of its nature, regardless of his guilt or innocence, and regardless of the circumstances of the case. The Court's opinion in *Noia* shows, from beginning to end, that the defendant's guilt or innocence is at least one of the vital considerations in determining whether collateral relief should be available to a convicted defendant. The Court repeatedly emphasized that the only evidence against Noia was a coerced confession and that he remained in jail while the State permitted his alleged confederates to go free. The Court made it clear that equitable considerations such as these should play a part in determining the availability of federal habeas corpus:

> "Although we hold that the jurisdiction of the federal courts on habeas corpus is not affected by procedural defaults incurred by the applicant during the state court proceedings, we recognize a limited discretion in the federal judge to deny relief to an applicant under certain circumstances. Discretion is implicit in the statutory command that the judge, after granting the writ and holding a hearing of appropriate scope, 'dispose of the matter as law and justice require,' 28 U. S. C. § 2243; and discretion was the flexible concept employed by the federal courts in developing the exhaustion rule. Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles."[4]

And in its closing paragraph, the Court stressed:

> "Today as always few indeed is the number of state prisoners who eventually win their freedom by means of federal habeas corpus. Those few who are ultimately successful are persons whom society has grievously wronged and for whom belated liberation is little enough compensation."[5]

Surely, it cannot be said of Kaufman, an admitted armed robber, that he is a person whom "society has grievously wronged and for whom belated liberation is little enough compensation."

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[4] 372 U. S. 391, 438.

[5] *Id.*, at 440–441.

Although, as the Court of Appeals indicated in the *Thornton* case, habeas corpus has been thought of broadly as a means of securing redress for the violation of any "constitutional right," it was true until *Mapp* v. *Ohio,* 367 U. S. 643 (1961), that almost every "constitutional right" referred to in this sense played a central role in assuring that the trial would be a reliable means of testing guilt. It is true that the prohibition against coerced confessions has been vigorously enforced even in the absence of proof that the confession itself was unreliable, *e. g., Rogers* v. *Richmond,* 365 U. S. 534 (1961), but even this prohibition rests to a substantial extent on recognition that all such confessions "may be and have been, to an unascertained extent, found to be untrustworthy," *id.,* at 541.

A claim of illegal search and seizure under the Fourth Amendment is crucially different from many other constitutional rights; ordinarily the evidence seized can in no way have been rendered untrustworthy by the means of its seizure and indeed often this evidence alone establishes beyond virtually any shadow of a doubt that the defendant is guilty. A good example of such a case is one in which I filed a dissent today, *Harris* v. *Nelson, post,* p. 286. The prisoner in *Harris* was convicted on a charge that he had been in possession of marihuana, possession alone being a crime under state law. He later collaterally attacked that conviction, alleging that the marihuana had been unlawfully seized from his home, where he had been in illegal possession of it. He did not and evidently could not allege a single fact that would indicate the slightest possibility that he actually was innocent of the crime charged. Under these circumstances it implies no disrespect for the importance of the Fourth Amendment to recognize the simple proposition that treatment of search-and-seizure claims should correspond to the purpose of the Fourth Amendment exclusionary rule. As the Court of Appeals said in *Thornton:*[6]

> "Our rejection of the availability of collateral review for claims of unreasonable search and seizure (in the absence of exceptional circumstances) is not attributable to a low regard for the significance of the Fourth Amendment in our times and civilization. On the contrary, the magnitude of the Fourth Amendment in our constitutional constellation has prompted unusual remedies by Congress, as well as the courts. . . .
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> ". . . The corollary, however, is a contraction of the need for enlarging collateral review in order to assure effective vindication of the constitutional interests involved."

The purpose of the exclusionary rule, unlike most provisions of the Bill of Rights, does not include, even to the slightest degree, the goal of insuring that the guilt-determining process be reliable. Rather, as this Court has said time and again, the rule has one primary and overriding purpose, the deterrence of unconstitutional searches and seizures by the police. As the Court said in *Linkletter* v. *Walker,* 381 U. S. 618, 636–637 (1965):

> "*Mapp* had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action. Indeed, all of the cases since *Wolf* [v. *Colorado,* 338 U. S. 25 (1949)] requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action."

How this purpose can be served by the broad and unqualified rule adopted by the Court today is something of a mystery. Of course, the shortcomings inherent in any human system make it impossible to eliminate entirely all the incentives to conduct an illegal search. It would seem rather fanciful, however, to suggest that these inevitable incentives would be decreased to any significant extent by the fact that if a conviction is obtained, after adequate opportunities have been provided to litigate constitutional claims, and if this conviction is upheld by all the reviewing courts, the validity of the search and seizure may later be questioned in a collateral proceeding. Understandably, the Court does not make any such suggestion and indeed makes no effort to justify its result in terms of the long-recognized deterrent purpose of the exclusionary rule. The Court instead simply provides us with a string of citations that supposedly settle the question, at least as to state convictions, *ante,* at 225, but the Court neglects to mention that not one of the cases it cites contains a single intimation that the issue before us now was even considered.[7]

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[6] 125 U. S. App. D. C., at 118, 368 F. 2d, at 826.

The only other justification for the Court's result that can be gleaned from its opinion is the statement that the reasoning of the Court of Appeals in *Thornton* "exalts the value of finality in criminal judgments at the expense of the interest of each prisoner in the vindication of his constitutional rights." *Ante,* at 228. This astonishing statement is directly contrary to the principles this Court has consistently applied on this subject, as for example in *Elkins* v. *United States,* 364 U. S. 206, 217 (1960), where we said: "The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter—

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[7] Only one of these decisions, *Mancusi* v. *DeForte,* 392 U. S. 364 (1968), actually ordered the granting of habeas relief on the basis of a search-and-seizure claim, and in *Mancusi* (as in *Warden* v. *Hayden,* 387 U. S. 294 (1967)) the issue was not even theoretically before us since only in the most exceptional case would we have considered a question not mentioned in the State Warden's petition for a writ of certiorari.

to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." This same recognition that no personal right of the prisoner can be vindicated in these Fourth Amendment cases was stressed in this Court's opinion in *Linkletter, supra:* "We cannot say that this [deterrent] purpose would be advanced by making the rule retrospective. The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved. . . . Finally, the ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." 381 U. S., at 637.

The Court's consistent adherence to this approach has continued through all of the various "retroactivity" cases, including today's decision in *Desist* v. *United States, post,* p. 244, in which the Court emphasizes, quoting from *Linkletter,* that " '[t]he misconduct of the police . . . has already occurred and will not be corrected by releasing the prisoners involved,' " and that "the exclusionary rule is but a 'procedural weapon that has no bearing on guilt.' " It would be hard to find a more apt summary of this Court's holdings in these "retroactivity" cases than the statement that they "exal[t] the value of finality in criminal judgments at the expense of the interest of each prisoner in the vindication of his constitutional rights." But since this is the course the Court has chosen to steer, I think it would not be amiss to suggest that the Court at least decide this case on the same principles and seek to achieve a modest semblance of consistency. Instead the Court adopts a rule that offers no discernible benefits in enforcing the Fourth Amendment and insures that prisoners who are undoubtedly guilty will be set free.

It is seemingly becoming more and more difficult to gain acceptance for the proposition that punishment of the guilty is desirable, other things being equal. One commentator, who attempted in vain to dissuade this Court from today's holding, thought it necessary to point out that there is "a strong public interest in convicting the guilty."[8] Indeed the day may soon come when the ever-cautious law reviews will actually be forced to offer the timid and uncertain contention, recently suggested satirically, that "crime may be thought socially undesirable, and its control a 'valid governmental objective' to which the criminal law is 'rationally related.'"[9]

I cannot agree to a rule, however technical it may seem, that leads to these results. I would not let any criminal conviction become invulnerable to collateral attack where there is left remaining the probability or possibility that constitutional commands related to the integrity of the fact-finding process have been violated. In such situations society has failed to perform its obligation to prove beyond a reasonable doubt that the defendant committed the crime. But it is quite a different thing to permit collateral attack on a conviction after a trial according to due process when the defendant clearly is, by the proof and by his own admission, guilty of the crime charged. There may, of course, as the Court of Appeals held in the *Thornton* case, be some special circumstances in which allowance of a Fourth Amendment claim in a collateral proceeding would be justified in terms of the relevant and applicable constitutional principles. Some of the situations possibly falling in this category have been enumerated and examined by others,[10] and there are circumstances alleged here that might lead to such a disposition of this case.[11] But the Court does not rest its judgment on this narrow ground, and I therefore do not attempt to pass on it. I do contend, however, that the court below was right in refusing to follow the broad rule that this Court is announcing today. In collateral attacks whether by habeas corpus or by § 2255 proceedings, I would always require that the convicted defendant raise the kind of constitutional claim that casts some shadow of a doubt on his guilt. This defendant is permitted to attack his conviction collaterally although he conceded at the trial and does not now deny that he had robbed the savings and loan association and although the evidence makes absolutely clear that he knew what he was doing. Thus, his guilt being certain, surely he does not have a constitutional right to get a new trial. I cannot possibly agree with the Court.

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[8] Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U. Pa. L. Rev. 378, 389 (1964).

[9] 79 Harv. L. Rev. (parody ed.) 10, 12 (March 1966).

[10] *Thornton* v. *United States, supra;* Amsterdam, *supra,* n. 8, at 391–392, n. 60.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

I concur in much of my Brother BLACK's opinion, and agree with his conclusion that 28 U. S. C. § 2255 should be available to contest the admission of evidence allegedly seized in violation of the Fourth Amendment only under limited and special circumstances of the sort suggested in *Thornton* v. *United States*, 125 U. S. App. D. C. 114, 368 F. 2d 822 (1966). I must, however, disassociate myself from any implications, see, *e. g.*, *ante*, at 232–233, 234–236, that the availability of this collateral remedy turns on a petitioner's assertion that he was in fact innocent, or on the substantiality of such an allegation.

I think it appropriate to add that the main roots of the situation against which my Brother BLACK so rightly inveighs are to be found in the Court's decisions in *Townsend* v. *Sain,* 372 U. S. 293 (1963), and *Fay* v. *Noia,* 372 U. S. 391 (1963), which have opened wide the gates to collateral re-examination of both state and federal criminal convictions. Be that as it may, the present case offers an opportunity to narrow the entrance in a fair and practicable manner. In rejecting the opportunity, the Court once again* this Term imposes a burden on the judiciary and on society at large, which results in no legitimate benefit to the petitioner and does nothing to serve the interests of justice.

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[11] Petitioner's allegations suggest that he may have been unjustifiably frustrated in his efforts to raise the search-and-seizure issue on direct appeal from his conviction. See the Court's opinion, *ante*, at 220, n. 3.

I therefore dissent from the opinion of the Court.

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*See my dissent in *Gardner* v. *California,* 393 U. S. 367, 371 (1969).

DESIST ET AL. *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 12. Argued November 12, 1968.—Decided March 24, 1969.

The decision in *Katz* v. *United States,* 389 U. S. 347, which held that the reach of the Fourth Amendment "cannot turn upon the presence or absence of a physical intrusion into any given enclosure," and that every electronic eavesdropping upon private conversations is a search and seizure which, as a general rule, can comply with constitutional standards only when authorized by a magistrate on a showing of probable cause under precise limitations and safeguards, to the extent that it departed from previous holdings of the Court, is to be applied prospectively only. Pp. 246–254.

384 F. 2d 889, affirmed.

Abraham Glasser argued the cause for petitioners. With him on the briefs were *David M. Markowitz* and *Irving Younger.*

Francis X. Beytagh, Jr., argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg, Ronald L. Gainer,* and *Roger A. Pauley.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioners were convicted by a jury in the District Court for the Southern District of New York of conspiring to import and conceal heroin in violation of the federal narcotics laws.[1] An important part of the Gov-

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[1] 35 Stat. 614, as amended, 21 U. S. C. § 173 provides in pertinent part:

"It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction . . . ."

21 U. S. C. § 174 provides in pertinent part:

"Whoever fraudulently or knowingly imports or brings any narernment's evidence consisted of tape recordings of conversations among several of the petitioners in a New York City hotel room. The tapes were made by federal officers in the adjoining room by means of an electronic recording device which did not physically intrude into the petitioners' room.[2] Because there was no "trespass" or "actual intrusion into a constitutionally protected

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cotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000."

[2] The room occupied by the petitioners was separated from that of the agents by two doors with a small air space between them. According to the testimony of the federal agents—which was properly credited by both courts below after an exhaustive hearing that included an actual reconstruction of the equipment in the hotel room—the microphone was taped to the door on their side. The face of the microphone was turned toward the ⅜-inch space between the door and the sill, and a towel was placed over the microphone and along the bottom of the door in order to minimize interference from sounds in the agents' room. A cable was run from the microphone to an amplifier and tape recorder in the bathroom adjoining the agents' room.

Petitioners contend that this installation was equivalent to a physical penetration of the petitioners' room because the airspace between the doors acted as a sound chamber, thereby facilitating the pickup of the conversations next door. We are unable, however, to distinguish this eavesdropping from that condoned in *Goldman* v. *United States,* 316 U. S. 129, where the agents simply placed a sensitive receiver against the partition wall. Petitioners' reliance on *Silverman* v. *United States,* 365 U. S. 505, is misplaced. The heating duct system used as a sound conductor by the agents in that case was "an integral part of the premises occupied by the petitioners," 365 U. S., at 511, and the agents had to penetrate the petitioners' house with a "spike microphone" before the heating duct could be thus employed.

area," the District Court and the Court of Appeals rejected the petitioners' argument that this evidence was inadmissible because the eavesdropping had violated their rights under the Fourth Amendment. The convictions were affirmed,[3] and we granted certiorari to consider the constitutional questions thus presented.[4]

Last Term in *Katz* v. *United States,* 389 U. S. 347, we held that the reach of the Fourth Amendment "cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Id.,* at 353. Noting that the "Fourth Amendment protects people, not places," *id.,* at 351, we overruled cases holding that a search and seizure of speech requires some trespass or actual penetration of a particular enclosure. We concluded that since every electronic eavesdropping upon private conversations is a search or seizure, it can comply with constitutional standards only when authorized by a neutral magistrate upon a showing of probable cause and under precise limitations and appropriate safeguards. The eavesdropping in this case was not carried out pursuant to such a warrant, and the convictions must therefore be reversed if *Katz* is to be applied to electronic surveillance conducted before the date of that decision. We have concluded, however, that to the extent *Katz* departed from previous holdings of this Court, it should be given wholly prospective application. Accordingly, and because we find no merit in any of the petitioners' other challenges to their convictions, we affirm the judgment before us.[5]

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[3] 384 F. 2d 889.

[4] 390 U. S. 943.

[5] The only other issues which warrant mention relate to the Government's disclosure to the Court of Appeals of two instances of admittedly trespassory electronic surveillance affecting the petitioners. The Court of Appeals remanded the case to the District Court for a full evidentiary hearing on the subject matter of the disclosures. The first monitoring episode occurred during 1962–1963,

We are met at the outset with the petitioners' contention that *Katz* does not actually present a choice between prospective or retroactive application of new constitutional doctrine. The Court in that decision, it is said, did not depart from any existing interpretation of the Constitution, but merely confirmed the previous demise of obsolete decisions enunciating the distinction between "trespassory" searches and those in which there was no physical penetration of the protected premises. *Goldman* v. *United States,* 316 U. S. 129; *Olmstead* v. *United States,* 277 U. S. 438.[6] But this contention misconstrues our opinion in *Katz.* Our holding there that *Goldman*

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when a device was installed in a Florida restaurant. The surveillance was directed at the owner of the restaurant rather than at any of the petitioners, but petitioner Dioguardi was overheard talking about the operations of the restaurant. The log sheets covering the entire period of surveillance were turned over to the District Judge for *in camera* inspection, and those relating to any conversations of Dioguardi were furnished to the defense. The second instance was an attempted bugging of a rented car used by petitioners Nebbia, Desist, and LeFranc in furtherance of the conspiracy. Again all records pertaining to this episode were turned over to the defense.

District Judge Palmieri, after holding an extensive hearing at which the petitioners were granted unrestrained opportunity to introduce evidence and cross-examine witnesses, concluded that none of the "evidence used against [the petitioners] at the trial was tainted by any invasion of their constitutional rights." 277 F. Supp. 690, 700. Judge Palmieri found that the Dioguardi conversations overheard in 1962–1963 were totally unrelated to the events of the conspiracy, which transpired over two years later. With regard to the second instance, he found that the device installed in the rented car "did not function and that nothing coherent was obtained." *Id.,* at 692. The Court of Appeals held that these findings were supported by the evidence and that the petitioners were accorded all the procedural rights to which they were entitled. We agree. See *Alderman* v. *United States, ante,* p. 165.

[6] See also *On Lee* v. *United States,* 343 U. S. 747.

and *Olmstead* "can no longer be regarded as controlling," 389 U. S., at 353, recognized that those decisions had not been overruled until that day.[7] True, the principles they expressed had been modified. The belief that an oral conversation could not be the object of a "search" or "seizure" had not survived.[8] And in *Silverman* v. *United States,* 365 U. S. 505, we had cautioned that the scope of the Fourth Amendment could not be ascertained by resort to the "ancient niceties of tort or real property law." 365 U. S., at 511. But the assumption persisted that electronic surveillance did not offend the Constitution unless there was an "actual intrusion into a constitutionally protected area." [9] While decisions before *Katz* may have reflected growing dissatisfaction with the traditional tests of the constitutional validity of electronic surveillance,[10] the Court consistently reiterated those tests and declined invitations to abandon them.[11] However clearly our holding in *Katz* may have been foreshadowed, it was a clear break with the past, and we are thus compelled to decide whether its application should be limited to the future.

Ever since *Linkletter* v. *Walker,* 381 U. S. 618, 629, established that "the Constitution neither prohibits nor requires retrospective effect" for decisions expounding new constitutional rules affecting criminal trials, the Court has viewed the retroactivity or nonretroactivity of such decisions as a function of three considerations. As we most recently summarized them in *Stovall* v. *Denno,* 388 U. S. 293, 297,

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[7] See also 389 U. S., at 362 (HARLAN, J., concurring); 389 U. S., at 367, 372 (BLACK, J., dissenting).

[8] See, *e. g., Wong Sun* v. *United States,* 371 U. S. 471, 485; *Lanza* v. *New York,* 370 U. S. 139, 142; *Silverman* v. *United States,* 365 U. S. 505; *Irvine* v. *California,* 347 U. S. 128.

[9] *Silverman* v. *United States, supra,* at 512.

[10] In *Katz,* 389 U. S., at 353, for example, we referred to our previous observation in *Warden* v. *Hayden,* 387 U. S. 294, 304, that "[t]he premise that property interests control the right of the Government to search and seize has been discredited."

[11] See *Berger* v. *New York,* 388 U. S. 41, 44, 50–53, 64; *Clinton* v. *Virginia,* 377 U. S. 158; *Lopez* v. *United States,* 373 U. S. 427, 437–439; *Silverman* v. *United States, supra,* at 510–512.

> "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." [12]

Foremost among these factors is the purpose to be served by the new constitutional rule.[13] This criterion strongly supports prospectivity for a decision amplifying the evidentiary exclusionary rule. Thus, it was principally the Court's assessment of the purpose of *Mapp* v. *Ohio,* 367 U. S. 643, which led it in *Linkletter* to deny those finally convicted the benefit of *Mapp's* extension of the exclusionary rule to the States:

> "all of the cases . . . requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action. . . . We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police . . . has already occurred and will not be corrected by releasing the prisoners involved." 381 U. S., at 636–637.[14]

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[12] See also *DeStefano* v. *Woods,* 392 U. S. 631; *Johnson* v. *New Jersey,* 384 U. S. 719, 727; *Tehan* v. *Shott,* 382 U. S. 406, 413; *Linkletter* v. *Walker,* 381 U. S. 618, 629.

[13] See *Roberts* v. *Russell,* 392 U. S. 293, 295; *Witherspoon* v. *Illinois,* 391 U. S. 510, 523, n. 22.

[14] In other areas where retroactivity has been denied the "purpose" criterion offered much weaker support. Cf. *Stovall* v. *Denno,* 388 U. S. 293, 298, where it was conceded that "the *Wade* and *Gilbert* rules also are aimed at avoiding unfairness at the trial

We further observed that, in contrast with decisions which had been accorded retroactive effect,[15] "there is no likelihood of unreliability or coercion present in a search-and-seizure case"; the exclusionary rule is but a "procedural weapon that has no bearing on guilt," and "the fairness of the trial is not under attack." 381 U. S., at 638, 639. Following this reasoning of *Linkletter,* we recently held in *Fuller* v. *Alaska,* 393 U. S. 80, that the exclusionary rule of *Lee* v. *Florida,* 392 U. S. 378, should be accorded only prospective application. Analogizing *Lee* to *Mapp,* we concluded that evidence seized in violation of § 605 of the Federal Communications Act[16] was "no less relevant and reliable than that seized in violation of the Fourth Amendment," and that both decisions were merely "designed to enforce the federal law." 393 U. S., at 81.

The second and third factors—reliance of law enforcement officials, and the burden on the administration of justice that would flow from a retroactive application—also militate in favor of applying *Katz* prospectively. *Katz* for the first time explicitly overruled the "physical penetration" and "trespass" tests enunciated in earlier decisions of this Court. Our periodic restatements of those tests confirmed the interpretation that police and courts alike had placed on the controlling precedents and

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by enhancing the reliability of the fact-finding process in the area of identification evidence"; *Johnson* v. *New Jersey,* 384 U. S. 719, 730, where it was recognized that "*Escobedo* and *Miranda* guard against the possibility of unreliable statements in every instance of in-custody interrogation"; and *Tehan* v. *Shott,* 382 U. S. 406, 414, where it was stated that "the 'purpose' of the *Griffin* rule is to be found in the whole complex of values that the privilege against self-incrimination itself represents," including "our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'" *Id.,* at 414–415, n. 12.

[15] *Jackson* v. *Denno,* 378 U. S. 368; *Gideon* v. *Wainwright,* 372 U. S. 335; *Griffin* v. *Illinois,* 351 U. S. 12.

[16] 48 Stat. 1103, 47 U. S. C. § 605.

fully justified reliance on their continuing validity. Nor had other courts theretofore held that the prohibitions of the Fourth Amendment encompassed "non-trespassory" electronic surveillance. On the contrary, only a few months before the eavesdropping in this case, the Court of Appeals for the Second Circuit had upheld the introduction of electronic evidence obtained by the same narcotics agent with a virtually identical installation. *United States* v. *Pardo-Bolland,* 348 F. 2d 316, cert. denied, 382 U. S. 944.

Although there apparently have not been many federal convictions based on evidence gathered by warrantless electronic surveillance,[17] we have no cause to doubt that the number of state convictions obtained in reliance on pre-*Katz* decisions is substantial.[18] Moreover, the determination of whether a particular instance of eavesdropping led to the introduction of tainted evidence at trial would in most cases be a difficult and time-consuming task, which, particularly when attempted long after the event, would impose a weighty burden on any court. Cf. *Alderman* v. *United States, ante,* at 180–185. It is to be noted also that we have relied heavily on the factors of the extent of reliance and consequent burden on the administration of justice only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity.[19] Because the deterrent purpose of *Katz* overwhelmingly supports nonretroactivity, we would reach that result even if relatively few convictions would be set aside by its retroactive application.

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[17] The Government has informed us in its brief that "[i]nstead of a wholesale release of thousands of convicted felons, only a relatively small number would probably be affected [by a retroactive application of *Katz*], since electronic surveillance has played a part in a limited number of federal cases."

[18] We noted in *Berger* v. *New York,* 388 U. S. 41, 48–49, that only a handful of States have prohibited or regulated electronic surveillance by law enforcement officials.

[19] See *DeStefano* v. *Woods,* 392 U.S. 631; *Stovall* v. *Denno,* 388 U. S. 293; *Johnson* v. *New Jersey,* 384 U. S. 719. Cf. cases cited in n. 13, *supra.*

The petitioners argue that even if *Katz* is not given fully retrospective effect, at least it should govern those cases which, like the petitioners', were pending on direct review when *Katz* was decided. Petitioners point out that in *Linkletter,* the only other case involving the retroactivity of a Fourth Amendment decision, the Court held *Mapp* applicable to every case still pending on direct review on the date of that decision. A similar approach was adopted in *Tehan* v. *Shott,* 382 U. S. 406, with respect to the prospectivity of *Griffin* v. *California,* 380 U. S. 609. In *Johnson* v. *New Jersey,* 384 U. S. 719, however, we abandoned the approach taken in *Linkletter* and *Tehan* and concluded that "there are no jurisprudential or constitutional obstacles" to the adoption of a different cut-off point. *Id.,* at 733. We explained that

> "[o]ur holdings in *Linkletter* and *Tehan* were necessarily limited to convictions which had become final by the time *Mapp* and *Griffin* were rendered. Decisions prior to *Linkletter* and *Tehan* had already established without discussion that *Mapp* and *Griffin* applied to cases still on direct appeal at the time they were announced." *Id.,* at 732.[20]

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[20] In *Linkletter* itself the Court noted that it dealt only with the narrow issue whether *Mapp* should be applied to final as well as nonfinal convictions:

"[*Mapp*] has also been applied to cases still pending on direct review at the time it was rendered. Therefore, in this case, we are concerned only with whether the exclusionary principle enunciated in *Mapp* applies to state court convictions which had become final before rendition of our opinion." 381 U. S., at 622.

Mapp had already been applied in *Ker* v. *California,* 374 U. S. 23; *Fahy* v. *Connecticut,* 375 U. S. 85; *Stoner* v. *California,* 376 U. S. 483. *Griffin* had been applied in *O'Connor* v. *Ohio,* 382 U. S. 286, shortly before *Tehan* was decided.

Here, on the other hand, as in *Johnson,* "the possibility of applying [*Katz*] only prospectively is yet an open issue." *Ibid.*

All of the reasons for making *Katz* retroactive also undercut any distinction between final convictions and those still pending on review. Both the deterrent purpose of the exclusionary rule and the reliance of law enforcement officers focus upon the time of the search, not any subsequent point in the prosecution, as the relevant date. Exclusion of electronic eavesdropping evidence seized before *Katz* would increase the burden on the administration of justice, would overturn convictions based on fair reliance upon pre-*Katz* decisions, and would not serve to deter similar searches and seizures in the future.

Nor can it sensibly be maintained that the Court is foreclosed by *Linkletter* in this case, as it was not in *Johnson,* simply because *Katz,* like *Mapp,* was a Fourth Amendment decision.[21] In neither *Linkletter* nor *Johnson* was it intimated that the cut-off points there adopted depended in any degree on the constitutional provision involved. There is, moreover, a significant distinction between the *Mapp* and *Katz* decisions. *Mapp* dealt solely with the applicability of the exclusionary rule to the States; "the situation before *Mapp* . . . [was that] the States at least knew that they were constitutionally forbidden from engaging in unreasonable searches and seizures under *Wolf* v. *Colorado,* 338 U. S. 25 (1949)." [22] Before *Katz* on the other hand, "non-trespassory" electronic surveillance was not thought to fall within the reach of the Fourth Amendment.[23] Therefore, this case lacks whatever impetus the *knowingly* unconstitutional conduct by the States may have provided in *Linkletter* to apply *Mapp* to all pending prosecutions.

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[21] Actually, *Mapp* was, of course, decided under the Fourth and Fourteenth Amendments, with one member of the five-man majority relying at least in part on the Fifth Amendment. 367 U. S., at 661–666 (Black, J., concurring).

[22] *Johnson* v. *New Jersey,* 384 U. S. 719, 731. And see *Tehan* v. *Shott,* 382 U. S. 406, 417.

In sum, we hold that *Katz* is to be applied only to cases in which the prosecution seeks to introduce the fruits of electronic surveillance conducted after December 18, 1967.[24] Since the eavesdropping in this case occurred before that date and was consistent with pre-*Katz* decisions of this Court, the convictions must be

Affirmed.

MR. JUSTICE BLACK, while adhering to his dissent in *Linkletter* v. *Walker,* 381 U. S. 618, 640 (1965), concurs in the affirmance of the judgment of convictions in this case for the reasons stated in his dissenting opinion in *Katz* v. *United States,* 389 U. S. 347, 364 (1967).

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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[23] Indeed, since the Fourth Amendment prohibits only *unreasonable* searches and seizures, it could be argued that there was, in fact, no Fourth Amendment violation in the present case. The law enforcement officers could certainly be said to have been acting "reasonably" in measuring their conduct by the relevant Fourth Amendment decisions of this Court. Cf. *Katz* v. *United States,* 389 U. S. 347, 356; *James* v. *United States,* 366 U. S. 213, 221–222, 245.

[24] The dissenting opinion of MR. JUSTICE FORTAS suggests that our holding today denies "the benefit of a fundamental constitutional provision, and not merely of court-made rules implementing a constitutional mandate." *Post,* at 271. To the contrary, we simply decline to extend the court-made exclusionary rule to cases in which its deterrent purpose would not be served. The exclusionary rule "has no bearing on guilt" or "the fairness of the trial." *Linkletter* v. *Walker,* 381 U. S., at 638, 639.

Of course, Katz himself benefited from the new principle announced on that date, and, as our Brother DOUGLAS observes, to that extent the decision has not technically been given wholly prospective application. But, as we recently explained in *Stovall*

MR. JUSTICE DOUGLAS, dissenting.

It is a mystery to me why *Katz* v. *United States,* 389 U. S. 347, which was given retroactive effect to petitioner Katz will not be given retroactive effect to petitioner Desist and his copetitioners. That does not seem to me to be the administration of justice with an even hand. I would understand today's ruling if in *Katz* we had announced a new constitutional search-and-seizure rule to be applied prospectively in all cases. But we did not do that; nor did we do it in other recent cases announcing variations of old constitutional doctrine. The most notorious example is *Miranda* v. *Arizona,* 384 U. S. 436, where, as I recall, some 80 cases were presented raising the same question. We took four of them and held the rest and then disposed of each of the four, applying the new procedural rule retroactively. But as respects the rest of the pending cases we denied any relief. *Johnson* v. *New Jersey,* 384 U. S. 719. Yet it was sheer coincidence that those precise four were chosen. Any other single case in the group or any other four would have been sufficient for our purposes.

All this, and more, was stated by MR. JUSTICE BLACK in his dissent in *Linkletter* v. *Walker,* 381 U. S. 618, 640, in which I concurred. It is stated again with clarity and vigor by MR. JUSTICE HARLAN in today's dissent, Part I of which I join. It still remains a mystery how some convicted people are given new trials for unconstitutional convictions and others are kept in jail without any hope of relief though their complaints are equally

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v. *Denno,* 388 U. S. 293, 301, the fact that the parties involved in the decision are the only litigants so situated who receive the benefit of the new rule is "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum." Whatever inequity may arguably result from applying the new rule to those "chance beneficiaries" is "an insignificant cost for adherence to sound principles of decision-making." *Ibid.*

meritorious. At least the Court should not say as respects *Katz* that it is given "wholly prospective application," when it was made retroactive in his case.

The pretense that we were bound in *Katz* to apply the new rule retroactively to that defendant or not decide the case at all, is too transparent to need answer. See 1B J. Moore, Federal Practice 191 (2d ed. 1965); 1 K. Davis, Administrative Law Treatise § 5.09 (1958); Levy, Realist Jurisprudence and Prospective Overruling, 109 U. Pa. L. Rev. 1, 15; Currier, Time and Change in Judge-Made Law: Prospective Overruling, 51 Va. L. Rev. 201, 216–234 (1965).

In *Johnson* v. *New Jersey,* 384 U. S. 719, 733, where we announced that the rule in *Miranda* should apply only to cases commenced after that decision had been announced, we said:

> "there are no jurisprudential or constitutional obstacles to the rule we are adopting here. . . . In appropriate prior cases we have already applied new judicial standards in a wholly prospective manner. See *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411 (1964); *James* v. *United States,* 366 U. S. 213 (1961)."

Where the spirit is strong, there has heretofore been no impediment to producing only dictum through a "case or controversy." Indeed that tradition started with *Marbury* v. *Madison,* 1 Cranch 137.

MR. JUSTICE HARLAN, dissenting.

In the four short years since we embraced the notion that our constitutional decisions in criminal cases need not be retroactively applied, *Linkletter* v. *Walker,* 381 U. S. 618 (1965),[1] we have created an extraordinary collection of rules to govern the application of that principle. We have held that certain "new" rules are to be applied to all cases then subject to direct review, *Linkletter* v. *Walker, supra; Tehan* v. *Shott,* 382 U. S. 406 (1966); certain others are to be applied to all those cases in which trials have not yet commenced, *Johnson* v. *New Jersey,* 384 U. S. 719 (1966); certain others are to be applied to all those cases in which the tainted evidence has not yet been introduced at trial, *Fuller* v. *Alaska,* 393 U. S. 80 (1968); and still others are to be applied only to the party involved in the case in which the new rule is announced and to all future cases in which the proscribed official conduct has not yet occurred. *Stovall* v. *Denno,* 388 U. S. 293 (1967); *DeStefano* v. *Woods,* 392 U. S. 631 (1968).

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[1] In one instance this doctrine has been applied to a nonconstitutional decision. See *Lee* v. *Florida,* 392 U. S. 378 (1968), and its aftermath in *Fuller* v. *Alaska,* 393 U. S. 80 (1968).

Although it has more than once been said that "new" rules affecting "the very integrity of the fact-finding process," are to be retroactively applied, *Linkletter* v. *Walker, supra,* at 639; see also *Tehan* v. *Shott, supra,* at 416; *Fuller* v. *Alaska, supra,* at 81, this requirement was eroded to some extent in *Johnson* v. *New Jersey, supra,* at 728–729, and yet further in *Stovall* v. *Denno, supra,* at 299; see also *DeStefano* v. *Woods, supra.* Again, although it has been said that a decision will be retroactively applied when it has been "clearly foreshadowed" in our prior case law, *Johnson* v. *New Jersey, supra,* at 731; *Berger* v. *California,* 393 U. S. 314 (1969), the Court today rejects such a contention. *Ante,* at 248. Indeed, the Court now also departs from preexisting doctrine in refusing retroactive application within the federal system of the "new" rule ultimately laid down in *Katz* v. *United States,* 389 U. S. 347 (1967), despite its concession that "relatively few" federal cases would have to be reconsidered. Compare *ante,* at 251–252, with *Linkletter* v. *Walker, supra,* at 637; *Tehan* v. *Shott, supra,* at 418–419; *Johnson* v. *New Jersey, supra,* at 731–732; *Stovall* v. *Denno, supra,* at 300.

I have in the past joined in some of those opinions which have, in so short a time, generated so many incompatible rules and inconsistent principles. I did so because I thought it important to limit the impact of constitutional decisions which seemed to me profoundly unsound in principle. I can no longer, however, remain content with the doctrinal confusion that has characterized our efforts to apply the basic *Linkletter* principle. "Retroactivity" must be rethought.

I.

RETROACTIVITY ON DIRECT REVIEW.

Upon reflection, I can no longer accept the rule first announced two years ago in *Stovall* v. *Denno, supra,* and reaffirmed today, which permits this Court to apply a "new" constitutional rule entirely prospectively, while making an exception only for the particular litigant whose case was chosen as the vehicle for establishing that rule. Indeed, I have concluded that *Linkletter* was right in insisting that all "new" rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by this Court at the time the "new" decision is handed down.

Matters of basic principle are at stake. In the classical view of constitutional adjudication, which I share, criminal defendants cannot come before this Court simply to request largesse. This Court is entitled to decide constitutional issues only when the facts of a particular case *require* their resolution for a just adjudication on the merits. See *Marbury* v. *Madison,* 1 Cranch 137 (1803). We do not release a criminal from jail because we like to do so, or because we think it wise to do so, but only because the government has offended constitutional principle in the conduct of his case. And when another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a "new" rule of constitutional law.

The unsound character of the rule reaffirmed today is perhaps best exposed by considering the following hypothetical. Imagine that the Second Circuit in the present case had anticipated the line of reasoning this Court subsequently pursued in *Katz* v. *United States, supra,* at 352–353, concluding—as this Court there did—that "the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling." *Id.,* at 353. Would we have *reversed* the case on the ground that the principles the Second Circuit had announced—though identical with those in *Katz*—should not control because *Katz* is not retroactive? To the contrary, I venture to say that we would have taken satisfaction that the lower court had reached the same conclusion we subsequently did in *Katz.* If a "new" constitutional doctrine is truly right, we should not reverse lower courts which have accepted it; nor should we affirm those which have rejected the very arguments we have embraced. Anything else would belie the truism that it is the task of this Court, like that of any other, to do justice to each litigant on the merits of his own case. It is only if our decisions can be justified in terms of this fundamental premise that they may properly be considered the legitimate products of a court of law, rather than the commands of a super-legislature.

Re-examination of prior developments in the field of retroactivity leads me irresistibly to the conclusion that the only solid disposition of this case lies in vacating the judgment of the Court of Appeals and in remanding this case to that court for further consideration in light of *Katz.*

II.

RETROACTIVITY ON HABEAS CORPUS.

What has already been said is, from my standpoint, enough to dispose of the case before us. Ordinarily I would not go further. But in this instance I consider it desirable and appropriate to venture some observations on the application of the retroactivity doctrine in habeas corpus cases, under the prevailing scope of the "Great Writ" as set forth in this Court's 1963 decision in *Fay* v. *Noia,* 372 U. S. 391, and in today's decision in *Kaufman* v. *United States, ante,* p. 217. I believe this course is fitting because none of the Court's prior retroactivity decisions has faced up to the quite different factors which should govern the application of retroactivity in habeas corpus cases; because the retroactive application of *Katz* in habeas corpus cases would seem to be foreclosed by the present decision; because principled habeas retroactivity now seems to me to demand much more than the "purpose," "reliance," and judicial "administration" standards, *ante,* at 249, which have so far been regarded as the tests governing retroactivity in direct review and habeas corpus cases alike; and because the retroactivity doctrine is still in a developing stage. In what ensues I shall simply try to suggest some of the considerations which appear to me to lay bare the complexities of the retroactivity problem on habeas which I feel have not been sufficiently explored in past decisions, leaving expression of definitive views upon any of such considerations for future habeas cases to which they are germane.

A.

While, as I have argued, a reviewing court has the obligation to rule upon every decisive issue properly raised by the parties on direct review, the federal courts have never had a similar obligation on habeas corpus.

Indeed, until *Brown* v. *Allen,* 344 U. S. 443 (1953), federal courts would never consider the merits of a constitutional claim if the habeas petitioner had a fair opportunity to raise his arguments in the original proceeding.[2] See my dissent in *Fay* v. *Noia, supra,* at 449–463; see also Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 463 (1963). With habeas restricted in this way, the question of applying a "new" constitutional rule to convictions which had become final arose so infrequently that the retroactivity issue could not be considered a significant one in those days. Even under *Brown,* the retroactive application of "new" rules in habeas cases did not serve to erode the finality of criminal judgments to any substantial degree. It was the rare case in which the habeas petitioner had raised a "new" constitutional argument both at his original trial and on appeal. Yet it was only in such a case that *Brown* would permit a habeas court to apply the "new" rule. Cf. *Sunal* v. *Large,* 332 U. S. 174 (1947).

The conflict between retroactivity and finality only became of major importance with the Court's decision in *Fay* v. *Noia, supra.* For the first time, it was there held that, at least in some instances, a habeas petitioner could successfully attack his conviction collaterally despite the fact that the "new" rule had not even been suggested in the original proceedings. Thus, *Noia* opened the door for large numbers of prisoners to relitigate their convictions each time a "new" constitutional rule was announced by this Court.

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[2] An exception to this general rule was made, however, when the habeas petitioner attacked the constitutionality of the state statute under which he had been convicted. See, *e. g., Ex parte Siebold,* 100 U. S. 371 (1880). Since, in this situation, the State had no power to proscribe the conduct for which the petitioner was imprisoned, it could not constitutionally insist that he remain in jail.

I continue to believe that *Noia,* which has been given even broader scope in *Kaufman* v. *United States, supra,* constitutes an indefensible departure both from the historical principles which defined the scope of the "Great Writ" and from the principles of federalism which have formed the bedrock of our constitutional development. Nevertheless, my views on this score have not prevailed, and pending re-examination of the scope of habeas corpus, I believe myself obliged to consider on its own bottom the retroactivity problem which *Noia* has spawned, since it is a matter of the greatest importance if the integrity of the federal judicial process is to be maintained in this era of increasingly rapid constitutional change.

B.

The greatly expanded writ of habeas corpus seems at the present time to serve two principal functions. See *Kaufman* v. *United States, supra,* at 229; Mishkin, The Supreme Court, 1964 Term—Foreword: The High Court, The Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56, 77–101 (1965). First, it seeks to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted. It follows from this that all "new" constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas. See my Brother BLACK's dissent in *Kaufman* v. *United States, supra,* at 235–236. The new habeas, however, is not only concerned with those rules which substantially affect the fact-finding apparatus of the original trial. Under the prevailing notions, *Kaufman* v. *United States, supra,* at 224–226, the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards. In order to perform this deterrence function, the habeas court need not, as prior cases make clear, necessarily apply all "new" constitutional rules retroactively. In these cases, the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place.

The theory that the habeas petitioner is entitled to the law prevailing at the time of his conviction is, however, one which is more complex than the Court has seemingly recognized. First, it is necessary to determine whether a particular decision has really announced a "new" rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law. Only a short time ago, for example, we attempted to define with more precision the conditions governing the issuance of a search warrant under the Fourth Amendment. *Spinelli* v. *United States,* 393 U. S. 410 (1969). While we had never previously encountered the precise situation raised in *Spinelli,* our decision in that case rested upon the established doctrine that a magistrate may issue a warrant only when he can judge for himself the validity of the affiant's conclusion that criminal activity is involved. *Johnson* v. *United States,* 333 U. S. 10, 14 (1948); *Aguilar* v. *Texas,* 378 U. S. 108 (1964). Surely, it could not be thought that *Spinelli* should not be retroactively applied under the expanded habeas process because it was not announced until 1969. One need not be a rigid partisan of Blackstone to recognize that many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation. In such a context it appears very difficult to argue against the application of the "new" rule in all habeas cases since one could never say with any assurance that this Court would have ruled differently at the time the petitioner's conviction became final.

In the *Katz* case, however, one can say with assurance that there was a time at which this Court would have ruled differently. For in *Olmstead, Goldman,* and *On Lee,*[3] the Court did just that. Even under the prevailing view of habeas, this fact should be of significance. Although the threat of collateral attack may be necessary to assure that the lower federal and state courts toe the constitutional line, the lower courts cannot be faulted when, following the doctrine of *stare decisis,* they apply the rules which have been authoritatively announced by this Court. If anyone is responsible for changing these rules, it is this Court.

Even in this situation, however, the doctrine of *stare decisis* cannot always be a complete answer to the retroactivity problem if a habeas petitioner is really entitled to the constitutional law which prevailed at the time of his conviction. Consider, for example, the state of Fourth Amendment law as it existed after our decision in *Silverman* v. *United States,* 365 U. S. 505 (1961). As my Brother STEWART notes today, *ante,* at 248, *Silverman* went a long way toward rejecting the principles supporting the *Goldman* and *Olmstead* rules. The Court in *Silverman* cautioned that the scope of the Fourth Amendment's protection is "not inevitably measurable in terms of ancient niceties of tort or real property law." 365 U. S., at 511. The majority's opinion concluded with the warning: "We find no occasion to re-examine *Goldman* here, but we decline to go beyond it, by even a fraction of an inch." *Id.,* at 512. It is hard to believe that any lawyer worthy of the name could, after reading *Silverman,* rely with confidence on the continuing vitality of the *Goldman* rule. Nor is it by any means clear to me that it would have been improper for a lower court to have declined to follow *Goldman* in the light of *Silverman.*[4] Given the deterrence purpose of the expanded habeas corpus, it thus could be persuasively argued that the *Katz* rule should be applied to all cases which had not become final at the time *Silverman* was decided.[5]

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[3] *Olmstead* v. *United States,* 277 U. S. 438 (1928); *Goldman* v. *United States,* 316 U. S. 129 (1942); *On Lee* v. *United States,* 343 U. S. 747 (1952).

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[4] After *Silverman* was decided, we were careful to frame our decisions in such a way that a direct consideration of the "trespass" doctrine could be avoided. In *Lopez* v. *United States,* 373 U. S. 427, 439 (1963), we noted that: "The validity of [*Olmstead* and *Goldman*] is not in question here. Indeed this case involves no 'eavesdropping' whatever in any proper sense of that term. The Government did not use an electronic device to listen in on conversations it could not otherwise have heard. Instead, the device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant . . . ." In *Berger* v. *New York,* 388 U. S. 41, the Court found that New York's eavesdropping statute contained impermissibly vague standards even with regard to the authorization of electronic surveillance requiring a trespass. It concluded that "[t]his disposition obviates the necessity for any discussion of the other points raised." *Id.,* at 44. Moreover, *Berger* made it clear that we had rejected *Olmstead's* declaration that the Fourth Amendment did not protect the integrity of private conversations. Such an action would hardly strengthen a lawyer's or lower court's confidence in the continuing vitality of the "trespass" doctrine, which is also rooted in *Olmstead.*

Finally, the Court's suggestion that our unexplicated *per curiam* reversal in *Clinton* v. *Virginia,* 377 U. S. 158 (1964), was premised upon the "trespass" doctrine, see *ante,* at 248, n. 11, is not supported by the opinion in that case. Only Mr. Justice Clark expressly predicated his decision upon the doctrine. The other seven members of the majority did not state the ground upon which the reversal was based.

[5] While I do not question much that my Brother FORTAS says in his dissenting opinion, I am unable to adopt the extreme position

C.

Katz, of course, has been one of the lesser innovations of a decade that has witnessed revolutionary changes in the most fundamental premises of hitherto accepted constitutional law. And similar difficulties arise as to the retroactive application of the Court's other landmark decisions if one is to insist that a habeas petitioner is entitled to the law as it stood at the time of his conviction. It is possible to argue, for example, that the Court's decision in *Mapp* v. *Ohio,* 367 U. S. 643 (1961), imposing the exclusionary rule on the States, was a sufficient indication to the lower courts that they should no longer rely on the doctrine of *stare decisis* when confronted with the claim that other Bill of Rights guarantees should be incorporated into the Due Process Clause of the Fourteenth Amendment. It would follow from this position that all subsequent decisions incorporating various other provisions of the Bill of Rights into Due Process should be applied to all cases arising on habeas which were pending on appeal at the time *Mapp* was decided.

On the other hand, one could argue that *stare decisis* was still the appropriate rule for the lower courts until this Court made it clear that a particular guarantee was applicable to the States. It would follow from this position that the Court's decision in *Griffin* v. *California,*

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on retroactivity he proposes. Before *Silverman* was decided in 1961, no decision of this Court had undermined the conceptual basis of the *Olmstead* rule. Before 1961, even the most conscientious police department or judge had no reason to doubt the validity of the "trespass" rule. Nevertheless, MR. JUSTICE FORTAS would grant habeas corpus to prisoners whose convictions became final before *Silverman.* This result cannot be justified even if one assumes that it is proper for a habeas court to require "conceptual faithfulness" to our opinions and "not merely decisional obedience" to the rules they announce. See *post,* at 277.

380 U. S. 609 (1965), should be retroactively applied only to *Malloy* v. *Hogan,* 378 U. S. 1 (1964), which was the first case beginning the process of incorporating the Fifth Amendment's privilege against self-incrimination, and that *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), should not be applied to any of those cases which had become final before that decision required the States to provide criminal jury trials on the same basis as the Federal Government.

Neither of these positions would be squarely inconsistent with the Court's new view of habeas corpus. Indeed, if the Court in *Mapp* had given any indication whatever that it accepted my Brother BLACK's "incorporationist" philosophy in its pristine purity, see *Adamson* v. *California,* 332 U. S. 46, 68–123 (1947), it would appear that it would have been improper for the lower courts to rely on the old precedents to respond to the new claims advanced by criminal defendants. However, the Court has never accepted MR. JUSTICE BLACK's constitutional premises in full-blown form. Instead, it has embarked on a course of "selective incorporation" in which the nature of each particular Bill of Rights guarantee has been examined before it was imposed upon the States. Given the *ad hoc* character of this approach, and given the fundamental place of federalism in the traditional conception of constitutional adjudication, it could certainly be strongly argued that the lower courts could properly follow the traditional due process approach until the time this Court made it clear that a particular Bill of Rights guarantee had been incorporated.

The relationship for retroactivity purposes among the *Escobedo, Miranda, Wade,* and *Gilbert* decisions[6] presents another difficult problem under the new habeas corpus concept. It can be argued that the "line-up" cases, *Wade* and *Gilbert*, should be retroactively applied to all those cases pending when *Miranda* was decided. Since *Miranda* placed affirmative requirements upon police officers to assure that the accused would have an opportunity to obtain counsel at one "critical stage" of the criminal process, neither police officials nor the lower courts, it might be argued, could properly assume that other critical stages would not be comparably treated. Similarly, it may be suggested that the rules announced in both *Miranda* and the "line-up" cases should be applied to all cases still pending on appeal when *Escobedo* v. *Illinois* announced that the Sixth Amendment applied in the police station. For *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), had already established the proposition that the State must provide free counsel to indigents at the criminal trial.

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[6] *Escobedo* v. *Illinois,* 378 U. S. 478 (1964); *Miranda* v. *Arizona,* 384 U. S. 436 (1966); *United States* v. *Wade,* 388 U. S. 218 (1967); *Gilbert* v. *California,* 388 U. S. 263 (1967).

It is doubtless true that a habeas court encounters difficult and complex problems if it is required to chart out the proper implications of the governing precedents at the time of a petitioner's conviction. One may well argue that it is of paramount importance to make the "choice of law" problem on habeas as simple as possible, applying each "new" rule only to those cases pending at the time it is announced. While this would obviously be simpler, simplicity would be purchased at the cost of compromising the principle that a habeas petitioner is to have his case judged by the constitutional standards dominant at the time of his conviction.

I do not pretend to have exhausted in the foregoing discussion all the complexities of the retroactivity problem on habeas. But the considerations I have canvassed suggest that we should take a hard look at where we are going in the retroactivity field so that this new doctrine may be administered in accordance with the basics of the judicial tradition. Unfortunately, the Court does not even attempt this task.

For the reasons stated in Part I of this opinion I cannot subscribe to the affirmance of the judgment of the Court of Appeals. I would remand the case to that court for reconsideration in light of *Katz* v. *United States.*

MR. JUSTICE FORTAS, dissenting.*

The decisions today in *Kaiser* v. *New York* and *Desist* v. *United States* apply to only the limited number of cases where the constitutionally forbidden wiretap or eavesdropping occurred prior to December 18, 1967. It was on that day that we decided *Katz* v. *United States,* 389 U. S. 347, which administered the formal *coup de grace* to the moribund doctrine of *Olmstead* v. *United States,* 277 U. S. 438 (1928). The Court in effect grants absolution to police invasions of individual privacy by wiretaps and electronic devices not involving physical trespass, as long as the unconstitutional conduct took place before *Katz.* It holds that only from and after *Katz* will it apply the Fourth Amendment's command without reference to whether a physical trespass was involved. The significance of the decisions is not only that they deprive a relatively few convicted persons of their constitutional rights, but also that they diminish the Constitution; they imply that the availability of constitutional principle can be the subject of judicial choice in circumstances which, I respectfully submit, are far from compelling. I cannot agree.

The Court says that it has authority to determine whether a ruling will be made "retroactive," and it gives several reasons for its decision not to apply *Katz* "retroactively": (1) *Katz* "was a clear break with the

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*[This opinion applies also to No. 62, *Kaiser* v. *New York, post,* p. 280.]

past" because it repudiated *Olmstead's* requirement of a physical trespass into the accused's home or office, *ante*, at 248; (2) the purpose of the *Katz* rule excluding evidence even where there was no physical intrusion was to deter police invasion of constitutional rights, a purpose that would not be aided by "retrospective" application of the ruling; (3) police and courts alike, until *Katz*, justifiably relied upon the continuing vitality of *Olmstead;* and (4) it would unduly burden law administration to apply *Katz* "retroactively." The Court derives these factors from various of its decisions, commencing with *Linkletter* v. *Walker*, 381 U. S. 618 (1965),[1] in which decisions of this Court have been held to apply prospectively only.[2]

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[1] *Linkletter* held that the Court's decision in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), that illegally seized evidence was not admissible in state prosecutions, should not be applied "retroactively." In *Tehan* v. *Shott*, 382 U. S. 406 (1966), the Court held that its decision in *Griffin* v. *California*, 380 U. S. 609 (1965), that it violates the privilege against self-incrimination for the prosecution or the trial judge to comment on a criminal defendant's failure to testify in his defense, should not apply "retroactively." *Johnson* v. *New Jersey*, 384 U. S. 719 (1966), held that *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), and *Miranda* v. *Arizona*, 384 U. S. 436 (1966), should not apply "retroactively." *Stovall* v. *Denno*, 388 U. S. 293 (1967), held that *United States* v. *Wade*, 388 U. S. 218 (1967), and *Gilbert* v. *California*, 388 U. S. 263 (1967), both of which related to the right to counsel at a pretrial lineup, should not be applied "retroactively." In *DeStefano* v. *Woods*, 392 U. S. 631 (1968), the Court held that the right to trial by jury in state criminal prosecutions that had been established in *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), and *Bloom* v. *Illinois*, 391 U. S. 194 (1968), was not "retroactive." Finally, the Court held in *Fuller* v. *Alaska*, 393 U. S. 80 (1968), that *Lee* v. *Florida*, 392 U. S. 378 (1968), was not "retroactive." *Lee* ruled that evidence obtained in violation of § 605 of the Federal Communications Act of 1934, 48 Stat. 1103, 47 U. S. C. § 605, was inadmissible in state criminal prosecutions.

[2] The meaning of "prospectivity" or "non-retroactivity" has varied in the Court's decisions. In *Linkletter* v. *Walker*, *supra*, n. 1, and

In my judgment the Court's holding is of pervasive importance because it adds new and unhappy dimensions to the "non-retroactivity" doctrine. Not only does the Court deny the benefit of a fundamental constitutional provision, and not merely of court-made rules implementing a constitutional mandate [3] or of a statutory principle,[4] to a class of persons because of the chance operation of the judicial calendar; it does so in face of the fact that the ruling at issue is neither novel nor unanticipated. The Court's statement to the contrary is, as I shall discuss, simply insupportable.

I.

I do not challenge this Court's power to decline to apply newly devised rules implementing constitutional principles to prior cases or situations, or its authority to make similar accommodation when it changes long-

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Tehan v. *Shott, supra,* n. 1, *Mapp* and *Griffin* were said not to apply to convictions that had become final prior to the announcement of those decisions. But *Mapp* and *Griffin* were applied to cases pending on direct review at the time of those decisions. *Johnson* v. *New Jersey, supra,* n. 1, by contrast, held *Miranda* and *Escobedo* applicable only to trials begun after *Miranda* and *Escobedo* were announced. *Stovall* v. *Denno, supra,* n. 1, held that the *Wade* and *Gilbert* decisions should apply only to cases in which the illegal official conduct took place after the date of decision. *DeStefano* v. *Woods, supra,* n. 1, held that *Duncan* and *Bloom* should apply only to cases where the trial commenced after the date of decision, a date which, since these cases involved the right to jury trial, was apt to coincide with the date of the official conduct. *Fuller* v. *Alaska, supra,* n. 1, held that *Lee* v. *Florida, supra,* n. 1, would apply only in cases in which the illegally obtained evidence was introduced after the date of decision. In all of these cases, the new rule was applied also in the case in which it was announced.

[3] Cf. *Miranda* v. *Arizona,* 384 U. S. 436 (1966) (rules concerning in-custody interrogation); *Mapp* v. *Ohio,* 367 U. S. 643 (1961) (exclusionary rule).

[4] Cf. *Fuller* v. *Alaska,* 393 U. S. 80 (1968).

standing statutory interpretations. Most of the Court's "non-retroactivity" holdings have emerged in state cases dealing with the application of a ruling that was relatively unpresaged and the practical effect of which, if applied to the past as well as the future, would be acutely disruptive of state practice and institutions. In those cases the pressures of comity and the hesitancy drastically to nullify state actions lent special force to the demand that the decision should not be applied "retroactively." In *DeStefano* v. *Woods,* 392 U. S. 631 (1968), for example, these circumstances were deemed to warrant only prospective application of the right to trial by jury in state prosecutions that was established in *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), and *Bloom* v. *Illinois,* 391 U. S. 194 (1968).

The Court so held even though it thereby let stand convictions that had been rendered pursuant to a faulty reading of the Constitution. Even where considerations that favor "non-retroactivity" exist, however, a new constitutional rule will not always be "non-retroactively" applied. The Court has insisted that all persons, not just those selected by the chance of the calendar, receive the benefit of newly declared constitutional commands that are central to the reliability of the fact-finding process at trial and without which innocent persons may have been adjudged guilty. See, *e. g., Roberts* v. *Russell,* 392 U. S. 293 (1968) (holding retroactive *Bruton* v. *United States,* 391 U. S. 123 (1968)); *McConnell* v. *Rhay,* 393 U. S. 2 (1968) (holding retroactive *Mempa* v. *Rhay,* 389 U. S. 128 (1967)); *Arsenault* v. *Massachusetts,* 393 U. S. 5 (1968) (holding retroactive *White* v. *Maryland,* 373 U. S. 59 (1963)); *Berger* v. *California,* 393 U. S. 314 (1969) (holding retroactive *Barber* v. *Page,* 390 U. S. 719 (1968)); *Gideon* v. *Wainwright,* 372 U. S. 335 (1963); *Griffin* v. *Illinois,* 351 U. S. 12 (1956); *Jackson* v. *Denno,* 378 U. S. 368 (1964).

In the present cases, the Court decides that the lawfulness of wiretaps and electronic eavesdropping occurring before December 18, 1967, will be controlled by *Olmstead* v. *United States, supra,* a decision that the Court agrees is a false and insupportable reading of the Constitution. The Court holds that the Fourth Amendment meant something quite different before *Katz* was decided than it means afterwards; that Katz and persons whose rights are violated after the date of that decision may have the benefit of the true meaning of the constitutional provision, but that those who were victims before *Katz* may not.

If such a distinction in the application of a substantive constitutional principle can ever be justified, it can be only in the most compelling circumstances. Such circumstances might possibly exist if the newly announced principle related only to the States, in that it extended to the States a principle heretofore deemed to apply only to the Federal Government, or if "retroactive" application would place an extreme burden on the administration of justice; if the new ruling were wholly unanticipated in the decisions of the Court; and if the new rule did not directly and clearly affect the fairness of the trial. Cf. *DeStefano* v. *Woods, supra; Johnson* v. *New Jersey,* 384 U. S. 719 (1966); *Linkletter* v. *Walker, supra.* But there is no justification for refusing "retroactive" application to a constitutional principle merely because of an earlier reading of the Constitution that had been widely repudiated as unsound and that this Court's own intervening opinions had discredited, although not expressly overruled. *Olmstead* is in this category. *Katz* did no more than administer the *coup de grace* to its moribund doctrine. The action of the Court today cannot be justified by claiming that it is required by *Olmstead*'s continued vitality. On the contrary, the Court today breathes life into *Olmstead*'s corpse.

II.

In *Kaiser* v. *New York,* the Court affirms a state conviction despite the fact that the conviction was based upon telephone conversations that the police had recorded by a wiretap. The petitioner made the telephone calls to a coconspirator at a bar in Manhattan. The police had installed a wiretap device in the terminal box in the building where the bar was located.

The taps were made pursuant to a warrant issued under a New York statute. The warrant cannot, however, support the use of the wiretap evidence, for in *Berger* v. *New York,* 388 U. S. 41, decided on June 12, 1967, we held that the New York statute did not comply with Fourth Amendment requirements. The Court's decision rests instead on the fact that the petitioner's conversations were intercepted and recorded without a trespass and on the assertion that the *Olmstead* doctrine was fully viable at the time that the petitioner's telephone conversations were overheard.

In *Desist* v. *United States,* the federal case decided today, the federal agents attached the "uninvited ear" of the microphone to the outer instead of the inner panel of the double door separating their hotel room from that of the petitioners. Because of this distinction, their conduct is today held to be immunized from Fourth Amendment attack. *Olmstead* would sanction the differentiation. If the microphone had been attached to the inner panel, or if the agents had used a device that impinged by 1/1000th of an inch upon the room rented by petitioners, *Olmstead* would not have sanctified the result. See *Silverman* v. *United States,* 365 U. S. 505 (1961).[5]

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[5] If the evidence introduced in *Desist* had been obtained by telephone wiretap, I assume the majority would have to agree that it could not be used at trial. This is a federal case, and as early as

This distinction is, of course, nonsense, as I suppose most rational persons would agree; and I am unwilling to suppose that if the majority in *Olmstead* had foreseen the ensuing development and uninhibited use of electronic devices for searching out and seizing the words of others, it would have nevertheless allowed the perimeter of physical property rights to limit the Fourth Amendment's protection of citizens' privacy from unseen invasion.

In any event, there is no doubt that *Olmstead* was thoroughly repudiated by this Court long before December 18, 1967, when *Katz* was decided. *Katz* is not responsible for killing *Olmstead*. Prior cases had left the physical-trespass requirement of *Olmstead* virtually lifeless and merely awaiting the death certificate that *Katz* gave it. They demonstrated to all who were willing to receive the message that *Olmstead* would not shield eavesdropping because it took place outside the physical property line. *Silverman* v. *United States, supra; Clinton* v. *Virginia,* 377 U. S. 158 (1964); *Berger* v. *New York, supra.*

Not for 17 years, until this day, has this Court applied *Olmstead* to sanction a Fourth Amendment violation because of *Olmstead*'s peculiar distinction.[6] Statements by the Department of Justice in recent years have placed

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1937 this Court held that evidence obtained in violation of § 605 of the Federal Communications Act, 48 Stat. 1103, 47 U. S. C. § 605, may not be received in evidence in a federal court. *Nardone* v. *United States,* 302 U. S. 379. The fact that a telephone wiretap would not be admissible in the circumstances of this case further elucidates the whimsicality of the present decision. As a result of the chance sequence of decisions, the Court gives less scope to the Federal Government's violation of constitutional mandate than the Court would permit in the case of disregard of a statutory command.

[6] The Court did apply the *Olmstead* doctrine in *On Lee* v. *United States,* 343 U. S. 747 (1952). See also *Goldman* v. *United States,* 316 U. S. 129 (1942).

no reliance upon *Olmstead's* quaint constriction of the individual's area of privacy.[7] The Omnibus Crime Control and Safe Streets Act of 1968, recently enacted by Congress, does not recognize *Olmstead's* long-outmoded distinction between permissible and impermissible invasions of privacy. That statute requires judicial authorization for wiretaps and electronic surveillance, whether or not they would involve a physical trespass. Pub. L. 90–351, Tit. III, 82 Stat. 211. The New York statute involved in *Kaiser* purports to require warrants for eavesdropping, but it makes no such absurd distinction as *Olmstead* describes. N. Y. Code Crim. Proc. § 813–a.

Only those police officials and courts whose devotion to wiretapping and electronic surveillance is so intense as to induce them to exploit those techniques until the last spade of earth is shoveled on the doctrinal corpse have continued to rely on *Olmstead.* It is not the least of the unfortunate consequences of today's decisions that they validate this kind of foot-dragging. They reward those who fought the battle for uncontrolled police eavesdropping to the bitter end, despite the clear, though undelivered, verdict. They add this Court's approval to those who honor the Constitution's mandate only where acceptable to them or compelled by the precise and inescapable specifics of a decision of this Court. And they award dunce caps to those law enforcement officers, courts, and public officials who do not merely stand by until an inevitable decree issues from this Court, specifically articulating that which is clearly immanent in the fulfillment of the Constitution, but who generously apply the mandates of the Constitution as the developing case law elucidates them.

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[7] See, *e. g.*, Hearing pursuant to S. Res. 62 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 86th Cong., 1st Sess., pt. 4, 1034–1035, 1036 (1959); Hearings on S. 1086, S. 1221, S. 1495, and S. 1822 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st Sess., 372–373 (1961); Hearings on S. 2813 and S. 1495 before the Senate Committee on the Judiciary, 87th Cong., 2d Sess., 11–46 (1962); Hearings pursuant to S. Res. 39 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., pt. 3, 1154–1165 (1965); Hearings on S. 2187 and other bills before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., 33–35 (1966); Hearings pursuant to S. Res. 25 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., 48–58 (1967); Brownell, The Public Security and Wire Tapping, 39 Cornell L. Q. 195 (1954); Rogers, The Case for Wire Tapping, 63 Yale L. J. 792 (1954).

The full realization of our great charter of liberty, set forth in our Constitution, cannot be achieved by this Court alone. History does not embrace the years needed for us to hold, millimeter by millimeter, that such and such a penetration of individual rights is an infringement of the Constitution's guarantees. The vitality of our Constitution depends upon conceptual faithfulness and not merely decisional obedience. Certainly, this Court should not encourage police or other courts to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach.

The best evidence of the moribund state of *Olmstead* at the time *Katz* was decided is the Court's opinion in *Katz* itself. That opinion acknowledged and relied upon the fact that *Olmstead* had long ceased to have vitality. In *Katz,* the Court said:

> "It is true that the absence of [physical] penetration was at one time thought to foreclose further Fourth Amendment inquiry, *Olmstead* v. *United States,* 277 U. S. 438, 457, 464, 466; *Goldman* v. *United States,* 316 U. S. 129, 134–136, for that Amendment was thought to limit only searches and seizures of tangible property. But '[t]he premise that property interests control the right of the Gov-

> ernment to search and seize has been discredited.' *Warden* v. *Hayden,* 387 U. S. 294, 304. Thus, although a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any 'technical trespass under . . . local property law.' *Silverman* v. *United States,* 365 U. S. 505, 511. Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.
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> "We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling. . . ." 389 U. S., at 352–353.

Since *Katz* itself recognized that *Olmstead* had been "eroded by our subsequent decisions" and that we had "since departed from the narrow view on which [it] . . . rested," how can the Court now say that because *Katz* overruled *Olmstead* it "was a clear break with the past"? The issue presented by *Desist* and *Kaiser* is *not* whether the petitioners will be given the benefit of *Katz.* The issue is *not* whether *Katz* is "retroactive." The issue is whether *because* in *Katz* we formally announced that the "reach of [the Fourth Amendment] . . . cannot turn upon the presence or absence of a physical intrusion into any given enclosure," persons claiming the benefit of this principle prior to that date must be denied its protection. It is, I submit, entirely appropriate to state the issue in these terms because there can be no doubt whatever that if the present cases had been presented to this Court a day, a year, or a number of years before *Katz,* we would have held that the petitioners' constitutional rights had been violated, and that the petitioners were entitled, like any other citizens, to their constitutional rights. In these circumstances, I utterly fail to see how today's decisions can be justified. It is indeed a paradox that *Katz,* whose role it was to bury the corpse of *Olmstead,* is here being used to revive it.

KAISER *v.* NEW YORK.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 62. Argued January 16, 1969.—Decided March 24, 1969.

Evidence obtained by wiretapping conducted in 1964 pursuant to a warrant issued under N. Y. Code Crim. Proc. § 813–a (held violative of the Fourth and Fourteenth Amendments for overbreadth in *Berger* v. *New York,* 388 U. S. 41, only to the limited extent that it permitted a "trespassory intrusion into a constitutionally protected area") *held* admissible in state criminal trial, since the wiretapping occurred before (1) *Katz* v. *United States,* 389 U. S. 347, overruled prior decisions that the Fourth Amendment encompassed seizures of speech only if there was a trespass or a physical invasion of the speaker's constitutionally protected area, and (2) *Lee* v. *Florida,* 392 U. S. 378, extended the rule excluding evidence violative of § 605 of the Federal Communications Act to state trials; and both *Katz* v. *United States* and *Lee* v. *Florida* have been held to apply prospectively only (*Desist* v. *United States, ante,* p. 244, and *Fuller* v. *Alaska,* 393 U. S. 80, respectively). Pp. 281–283.

21 N. Y. 2d 86, 233 N. E. 2d 818, affirmed.

Henry J. Boitel, pro hac vice, and *Peter L. F. Sabbatino* argued the cause and filed briefs for petitioner.

William Cahn argued the cause for respondent. With him on the briefs was *George Danzig Levine.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner was convicted in a New York trial court in 1966 on three counts of conspiracy to extort, attempted extortion, and coercion. The case for the prosecution rested principally on the content of two telephone conversations between the petitioner and one of his coconspirators. Tapes and transcripts of those conversations were introduced at the trial over the petitioner's objection that they had been obtained by an unlawful wiretap. The conviction was affirmed by the Appellate Division of the Supreme Court of New York[1] and by the New York Court of Appeals.[2] We granted certiorari.[3]

The telephone calls in question were made in 1964 by the petitioner from outside New York City to a co-conspirator at a bar in Manhattan. The conversations were recorded by means of a device attached to wires of the central terminal box in the basement of the building in which the bar was located. This wiretapping was conducted pursuant to a warrant issued under N. Y. Code Crim. Proc. § 813–a, the statute with which this Court subsequently dealt in *Berger* v. *New York,* 388 U. S. 41, in reversing a conviction under the Fourth and Fourteenth Amendments.

The petitioner contends that the Fourth and Fourteenth Amendments as construed in *Berger,* as well as § 605 of the Federal Communications Act,[4] prohibited the introduction of the intercepted conversations and therefore require reversal of his conviction. For the reasons stated below, we reject these contentions and affirm the judgment of the New York Court of Appeals.[5]

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[1] 28 App. Div. 2d 647, 282 N. Y. S. 2d 207.

[2] 21 N. Y. 2d 86, 233 N. E. 2d 818.

[3] 390 U. S. 1023.

[4] Section 605, 48 Stat. 1103, 47 U. S. C. § 605, reads in pertinent part as follows:

"[N]o person not being authorized by the sender shall intercept any communication and divulge . . . the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . ."

[5] The petitioner also contends that the prosecutor's references to the recorded conversations as "confessions" were so inaccurate and misleading as to deny him due process. We do not believe that that characterization of the evidence raises any substantial federal question. The jury was aware that the prosecutor was adverting to the overheard conversations and knew the circumstances under which the incriminating statements had been made. In contrast to the

Not until last Term in *Katz* v. *United States,* 389 U. S. 347, did this Court overrule its prior decisions that the Fourth Amendment encompassed seizures of speech only if the law enforcement officers committed a trespass or at least physically invaded a constitutionally protected area of the speaker.[6] *Olmstead* v. *United States,* 277 U. S. 438, explicitly held that wiretapping conducted without such an intrusion was not an unlawful search or seizure. That rule was not modified by *Berger* v. *New York.* The Court's discussion of *Olmstead* in *Berger,* while recognizing that other cases had negated the statements in *Olmstead* that conversations are never protected by the Fourth Amendment, cast no doubt upon "[t]he basis of the [*Olmstead*] decision"—"that the Constitution did not forbid the obtaining of evidence by wiretapping unless it involved actual unlawful entry into the house." [7] Furthermore, the Court in *Berger* found the overbreadth of N. Y. Code Crim. Proc. § 813–a repugnant to the Fourth Amendment only to the limited extent that it permitted a "trespassory intrusion into a constitutionally protected area." [8]

Olmstead, then, stated the controlling interpretation of the Fourth Amendment with respect to wiretapping until it was overruled by *Katz.* And in *Desist* v. *United States, ante,* p. 244, we have held today that *Katz* is to be applied wholly prospectively. Since the wiretapping in this case occurred before *Katz* was decided and was accomplished without any intrusion into a constitutionally protected area of the petitioner, its fruits were not inadmissible under the exclusionary rule of the Fourth

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situation in *Miller* v. *Pate,* 386 U. S. 1, there was here no misrepresentation about evidence which the jurors were not themselves in a position to evaluate.

[6] See *Desist* v. *United States, ante,* at 247–248.

[7] 388 U. S., at 51.

[8] *Id.,* at 44. See also *id.,* at 43, 57, 60, 64, 69.

and Fourteenth Amendments. *Mapp* v. *Ohio,* 367 U. S. 643.

Nor did § 605 of the Federal Communications Act require exclusion of the intercepted conversations. Until our decision last Term in *Lee* v. *Florida,* 392 U. S. 378, state trial courts were free to accept evidence violative of § 605.[9] *Lee* extended the *Nardone*[10] exclusionary rule of § 605 to the States, but that decision has also been held to apply only prospectively. *Fuller* v. *Alaska,* 393 U. S. 80. The wiretapping evidence was introduced at the petitioner's trial in 1966, long before the date of our decision in *Lee.*

Affirmed.

MR. JUSTICE BLACK concurs in the result for the reasons stated in his dissenting opinions in *Berger* v. *New York,* 388 U. S. 41, 70, and *Katz* v. *United States,* 389 U. S. 347, 364.

MR. JUSTICE DOUGLAS dissents.

[For dissenting opinion of MR. JUSTICE FORTAS, see *ante,* p. 269.]

MR. JUSTICE HARLAN, dissenting.

It is conceded that petitioner's conviction rested largely upon evidence acquired by nontrespassory wiretapping conducted pursuant to a warrant issued under N. Y. Code Crim. Proc. § 813–a. The Court affirms the conviction on the ground that today's decision in *Desist* v. *United States, ante,* p. 244, necessarily dictates that evidence obtained by an illegal, nontrespassory wiretap will be inadmissible only if the tapping occurred after the date of the decision in *Katz* v. *United States,* 389 U. S. 347 (1967). The wiretapping in this case took place prior to *Katz.* However, the case is here on direct review, and for the reasons stated in Part I of my dissenting opinion in *Desist, supra,* at 258–259, I would hold that petitioner is entitled to benefit from the *Katz* rule.

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[9] *Schwartz* v. *Texas,* 344 U. S. 199.

[10] *Nardone* v. *United States,* 302 U. S. 379, holding that evidence seized in violation of § 605 by federal officers was not admissible in federal criminal trials. See also *Benanti* v. *United States,* 355 U. S. 96, holding that such evidence seized by state officers must also be excluded from federal trials.

It is therefore necessary for me to consider whether petitioner's federal constitutional rights were violated by the wiretapping. Were I free to do so, I would decide this issue by inquiring whether, on the facts of this particular case and in light of New York decisions construing § 813–a, the wiretapping was valid under the Warrants Clause of the Fourth Amendment. See *Ker* v. *California,* 374 U. S. 23, 30–34 (1963); see also *Mapp* v. *Ohio,* 367 U. S. 643 (1961). However, I believe that this approach is foreclosed by this Court's decision in *Berger* v. *New York,* 388 U. S. 41 (1967). In *Berger,* the Court held that a "bugging" pursuant to a § 813–a warrant violated the petitioner's Fourth Amendment rights because on its face the statute did not contain constitutionally required safeguards. It is true that the "bugging" in *Berger* involved a trespass and that the Court did not reach the question whether *Olmstead* should be overruled. But the holding that § 813–a was to be considered on its face rather than as applied depended in no way upon the fact of physical intrusion. The warrant procedure prescribed in § 813–a applies equally to "bugging" and to wiretapping. Hence, the Court's "on its face" approach would seem necessarily to embrace § 813–a wiretapping.

I dissented from the "on its face" approach adopted in *Berger.* See 388 U. S., at 89 *et seq.* I continue to disagree with that approach. Yet I think that *Berger* must be taken as having decided that a warrant issued pursuant to the version of § 813–a then in effect could not possibly satisfy the requirements of the Fourth Amendment.* Since I regard myself as bound by *Berger,* I am reluctantly compelled to conclude that the wiretap evidence introduced against petitioner was seized in violation of the Constitution, and that his conviction consequently cannot stand.

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*There were no amendments to § 813–a between June 1962, the date of the "bugging" in *Berger,* and July 1964, the date of the wiretapping in this case. Nor in my view is it necessary to decide whether *Berger* should be "retroactive." The present case was on direct appeal in the New York courts at the time *Berger* was decided, and petitioner is therefore entitled to invoke *Berger* under the rule advanced in Part I of my dissenting opinion in *Desist.*

HARRIS, U. S. DISTRICT JUDGE (WALKER, REAL PARTY IN INTEREST) *v.* NELSON, WARDEN.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 199. Argued December 9, 1968.—
Decided March 24, 1969.

A state prisoner filed a habeas corpus petition in the Federal District Court, alleging that the admission of certain evidence at his trial was improper because the evidence had been seized incident to an arrest based upon information from an unreliable informant. The District Court ordered an evidentiary hearing and the prisoner served on respondent a series of interrogatories pursuant to Rule 33 of the Federal Rules of Civil Procedure designed to establish the informant's unreliability. The District Court overruled respondent's objections that there was no authority for issuance of the interrogatories. Upon respondent's petition for a writ of mandamus or prohibition the Court of Appeals vacated the District Court's order authorizing the interrogatories, on the grounds that Rule 81 (a)(2) made the discovery procedures of the Federal Rules of Civil Procedure inapplicable to habeas corpus proceedings and that the statutory provision for interrogatories in habeas corpus proceedings (28 U. S. C. § 2246) did not authorize their use for discovery. Rule 81 (a)(2) at that time provided that the Rules did not apply to habeas corpus proceedings "except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity." *Held:*

1. Federal courts upon an appropriate showing must grant evidentiary hearings to petitioners for writs of habeas corpus and "the power of inquiry on federal habeas corpus is plenary." *Townsend* v. *Sain,* 372 U. S. 293, 312 (1963). Pp. 290–292.

2. The intended scope of the Federal Rules of Civil Procedure and the history of habeas corpus procedure make it clear that Rule 81 (a)(2) excludes the application of Rule 33 in habeas corpus proceedings. Pp. 292–298.

3. Section 2246 of 28 U. S. C. does not authorize interrogatories in habeas corpus proceedings except in limited circumstances not applicable to this case. Pp. 290, 296.

4. A district court considering a petition for habeas corpus is free to use or authorize interrogatories or other suitable discovery procedures reasonably fashioned to elicit facts to help the court "dispose of the matter as law and justice require." 28 U. S. C. § 2243. Pp. 290, 298–300.

5. Since Congress has not specified comprehensive procedures for securing the facts which federal courts must have to dispose of habeas corpus petitions, the courts may fashion appropriate procedures for development of relevant facts, by analogy to existing rules or judicial usages. Their authority to do so is confirmed by the All Writs Act, 28 U. S. C. § 1651. Pp. 298–300.

378 F. 2d 141, reversed and remanded.

J. Stanley Pottinger, by appointment of the Court, 393 U. S. 814, argued the cause and filed briefs for petitioner.

Derald E. Granberg, Deputy Attorney General of California, argued the cause for respondent. With him on the briefs were *Thomas C. Lynch,* Attorney General, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Charles R. B. Kirk,* Deputy Attorney General, joined in and adopted by the Attorneys General and other officials of their respective jurisdictions as follows: *MacDonald Gallion* of Alabama, *Gary K. Nelson* of Arizona, *Joe Purcell* of Arkansas, *Duke W. Dunbar* of Colorado, *David P. Buckson* of Delaware, *Earl Faircloth* of Florida, *Arthur K. Bolton* of Georgia, *Bert T. Kobayashi* of Hawaii, *William G. Clark* of Illinois, *John J. Dillon* of Indiana, *Richard C. Turner* of Iowa, *John B. Breckinridge* of Kentucky, *Jack P. F. Gremillion* of Louisiana, *James S. Erwin* of Maine, *Francis B. Burch* of Maryland, *Elliot L. Richardson* of Massachusetts, *Douglas M. Head* of Minnesota, *Joe T. Patterson* of Mississippi, *Clarence A. H. Meyer* of Nebraska, *Harvey Dickerson* of Nevada, *Arthur J. Sills* of New Jersey, *Boston E. Witt* of New Mexico, *Louis J. Lefkowitz* of New York, *T. Wade Bruton* of North Carolina, *Helgi Johanneson* of North Dakota, *William B. Saxbe* of Ohio, *G. T. Blankenship* of Oklahoma, *William C. Sennett* of Pennsylvania, *Herbert F. DeSimone* of Rhode Island, *Daniel R. McLeod* of South Carolina, *George F. McCanless* of Tennessee, *James L. Oakes* of Vermont, *Robert Y. Button* and *Reno S. Harp III* of Virginia, *John J. O'Connell* of Washington, *Bronson C. LaFollette* of Wisconsin, and *Paul J. Abbate* of Guam; and by the National District Attorneys' Association.

Jerome M. Feit argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Vinson, John S. Martin, Jr.,* and *Paul C. Summitt.*

Jack Greenberg, James M. Nabrit III, Michael Meltsner, and *Anthony G. Amsterdam* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., et al. as *amici curiae* urging reversal.

Louis J. Lefkowitz, Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Amy Juviler* and *Joel H. Sachs,* Assistant Attorneys General, filed a brief for the State of New York as *amicus curiae* urging affirmance.

MR. JUSTICE FORTAS delivered the opinion of the Court.

This case presents the question whether state prisoners who have commenced habeas corpus proceedings in a federal district court may, in proper circumstances, utilize the instrument of interrogatories for discovery purposes.

I.

Petitioner is the Chief Judge of the United States District Court for the Northern District of California. Respondent is the warden of the California State Prison at San Quentin. The proceeding was initiated by Alfred Walker who had been convicted in the California courts of the crime of possession of marihuana. After exhausting state remedies, he filed a petition for habeas corpus in the Federal District Court, alleging that evidence seized in the search incident to his arrest was improperly admitted at his trial. The basis for this claim was his allegation that the arrest and incidental search were based solely on the statement of an informant who, according to Walker's sworn statement, was not shown to have been reliable; who, in fact, was unreliable; and whose statements were accepted by the police without proper precautionary procedures.

The District Court issued an order to show cause and respondent made return. Thereafter, Walker filed a motion for an evidentiary hearing, which the District Court granted. Two months later, Walker served upon the respondent warden a series of interrogatories, pursuant to Rule 33 of the Federal Rules of Civil Procedure, seeking discovery of certain facts directed to proof of the informant's unreliability. Respondent filed objections to the interrogatories, alleging the absence of authority for their issuance. The District Judge, without stating his reasons, disallowed the objections and directed that the interrogatories be answered. Respondent applied to the Court of Appeals for the Ninth Circuit for a writ of mandamus or prohibition. The Ninth Circuit vacated the order of the District Court. It held that the discovery provisions of the Federal Rules of Civil Procedure were not applicable to habeas corpus proceedings and that 28 U. S. C. § 2246, the statutory provision specifically relating to the use of interrogatories in habeas corpus proceedings, did not authorize their use for discovery. *Wilson* v. *Harris*, 378 F. 2d 141 (1967).

Because of the importance of the questions presented and the diversity of views among the district and appellate courts that have considered the problem,[1] we granted certiorari. 392 U. S. 925. We agree with the Ninth Circuit that Rule 33 of the Federal Rules of Civil Procedure is not applicable to habeas corpus proceedings and that 28 U. S. C. § 2246 does not authorize interrogatories except in limited circumstances not applicable to this case; but we conclude that, in appropriate circumstances, a district court, confronted by a petition for habeas corpus which establishes a prima facie case for relief, may use or authorize the use of suitable discovery procedures, including interrogatories, reasonably fashioned to elicit facts necessary to help the court to "dispose of the matter as law and justice require." 28 U. S. C. § 2243. Accordingly, we reverse and remand the case in order that the District Court may reconsider the matter before it in light of our opinion and judgment.

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[1] Some courts have joined the Ninth Circuit in holding the discovery provisions of the Federal Rules wholly inapplicable to habeas

II.

The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbi-

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corpus proceedings. *E. g., Sullivan* v. *United States,* 198 F. Supp. 624, 625–627 (D. C. S. D. N. Y. 1961). On other occasions it has been held that the Rules apply only by "analogy." *Wilson* v. *Weigel,* 387 F. 2d 632, 634, n. 3 (C. A. 9th Cir. 1967); cf. *United States ex rel. Jelic* v. *District Director of Immigration,* 106 F. 2d 14, 20 (C. A. 2d Cir. 1939) (opinion by Judge Clark, who served as Reporter of the Advisory Committee on the Federal Rules of Civil Procedure). Several courts have held the Rules applicable because habeas is characterized generally as a "civil" proceeding. *E. g., United States ex rel. Seals* v. *Wiman,* 304 F. 2d 53, 64 (C. A. 5th Cir. 1962); cf. *Schiebelhut* v. *United States,* 318 F. 2d 785, 786 (C. A. 6th Cir. 1963) (28 U. S. C. § 2255 action). Some courts have sustained the use of particular discovery rules under the Federal Rules of Civil Procedure as necessary to effectuate statutory policy with respect to habeas corpus. *E. g., Knowles* v. *Gladden,* 254 F. Supp. 643, 644–645 (D. C. Ore. 1965), aff'd, 378 F. 2d 761 (C. A. 9th Cir. 1967). Others have apparently assumed that the rules applied to habeas without discussion of the question. *E. g., Fortner* v. *Balkcom,* 380 F. 2d 816, 818 (C. A. 5th Cir. 1967).

trary and lawless state action. Its pre-eminent role is recognized by the admonition in the Constitution that: "The Privilege of the Writ of Habeas Corpus shall not be suspended . . . ." U. S. Const., Art. I, § 9, cl. 2. The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.

As Blackstone phrased it, habeas corpus is "the great and efficacious writ, in all manner of illegal confinement." [2] As this Court said in *Fay* v. *Noia,* 372 U. S. 391, 401–402 (1963), the office of the writ is "to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints." See *Peyton* v. *Rowe,* 391 U. S. 54, 65–67 (1968).

It is now established beyond the reach of reasonable dispute that the federal courts not only may grant evidentiary hearings to applicants, but must do so upon an appropriate showing. *Townsend* v. *Sain,* 372 U. S. 293, 313 (1963); *Brown* v. *Allen,* 344 U. S. 443, 464, n. 19 (1953). And this Court has emphasized, taking into account the office of the writ and the fact that the petitioner, being in custody, is usually handicapped in developing the evidence needed to support in necessary detail the facts alleged in his petition, that a habeas corpus proceeding must not be allowed to founder in a "procedural morass." *Price* v. *Johnston,* 334 U. S. 266, 269 (1948).

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[2] 3 W. Blackstone, Commentaries *131 (Lewis ed. 1902). See generally *Fay* v. *Noia,* 372 U. S. 391, 399–415 (1963). Cf. *Frank* v. *Mangum,* 237 U. S. 309, 346 (Holmes, J., joined by Hughes, J., dissenting) (1915), "[*H*]*abeas corpus* cuts through all forms and goes to the very tissue of the structure. It comes in from the outside . . . and although every form may have been preserved opens the inquiry whether they have been more than an empty shell."

There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law. This Court has insistently said that the power of the federal courts to conduct inquiry in habeas corpus is equal to the responsibility which the writ involves: "The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary." *Townsend* v. *Sain, supra,* at 312.

In the present case, we are confronted with a procedural problem which tests the reality of these great principles. We are asked by Walker to establish the existence of rights for those in custody to discover facts which may aid their petitions for release. We are asked to do this by declaring that the provisions of the Federal Rules of Civil Procedure granting such rights to litigants in civil causes are available to Walker; or if we refuse so to conclude, to affirm the existence of power in the District Court to authorize discovery by written interrogatories. We address ourselves to those issues.

III.

Rule 1 of the Federal Rules of Civil Procedure provides that: "These rules govern the procedure in the United States district courts in all suits of a civil nature . . . with the exceptions stated in Rule 81." At the time of the decision below Rule 81 (a)(2) provided, in relevant part, that the Rules were not applicable in habeas corpus "except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity."[3]

The Court of Appeals for the Ninth Circuit held that the second requirement—"conformity" with practice—made it necessary to show that "prior to September 16, 1938, discovery was actually being used in habeas proceedings, and that such use conformed to the then discovery practice in actions at law or suits in equity." 378 F. 2d, at 144. No such showing was made and it is not here contended that it can be made. Walker contends, however, that the rule requires only a showing that habeas proceedings conformed generally to pre-existing practice in law and equity, and he contends that this general requirement is met.

We need not consider this contention that the Court of Appeals took an unnecessarily restricted view of the thrust of the "conformity" requirement, because for other reasons we conclude that the intended scope of the Federal Rules of Civil Procedure and the history of habeas corpus procedure, make it clear that Rule 81 (a)(2) must be read to exclude the application of Rule 33 in habeas corpus proceedings.

It is, of course, true that habeas corpus proceedings are characterized as "civil." See, *e. g., Fisher* v. *Baker*, 203 U. S. 174, 181 (1906). But the label is gross and inexact.[4] Essentially, the proceeding is unique. Habeas corpus practice in the federal courts has conformed with civil practice only in a general sense. There is no indication that with respect to pretrial proceedings for the development of evidence, habeas corpus practice had conformed to the practice at law or in equity "to the extent" that the application of rules newly developed in 1938 to govern discovery in "civil" cases should apply in order to avoid a divergence in practice which had theretofore been substantially uniform. Although there is little direct evidence, relevant to the present problem, of the purpose of the "conformity" provision of Rule 81 (a)(2), the concern of the draftsmen, as a general matter, seems to have been to provide for the continuing applicability of the "civil" rules in their new form to those areas of practice in habeas corpus and other enumerated proceedings in which the "specified" proceedings had theretofore utilized the modes of civil practice. Otherwise, those proceedings were to be considered outside of the scope of the rules without prejudice, of course, to the use of particular rules by analogy or otherwise, where appropriate.[5]

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[3] Rule 81 (a)(2) was amended, effective July 1, 1968, to read, "These rules are applicable to proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions." The amendment merely eliminated references to appellate procedure made inappropriate by the adoption of the Federal Rules of Appellate Procedure and does not affect the issue before us. See Report of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, 43 F. R. D. 61, 164 (explanatory note to the proposed revision of Rule 81 (a)(2)).

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[4] The degree to which this characterization excessively simplifies a complex history is discussed in Cohen, Some Considerations on the Origins of Habeas Corpus, 16 Can. B. Rev. 92 (1938), and Cohen, Habeas Corpus Cum Causa—The Emergence of the Modern Writ, 18 Can. B. Rev. 10, 172 (1940). Cf. *Sullivan* v. *United States,* 198 F. Supp. 624 (D. C. S. D. N. Y. 1961).

[5] The federal courts have applied some noncontroversial rules in habeas corpus proceedings. *E. g.,* Rule 6 (b)(2), extension of time for excusable neglect, *Bowen* v. *Boles,* 258 F. Supp. 111 (D. C. N. D. W. Va. 1966); Rule 15 (b), determination of issue not raised by pleadings, *Hamilton* v. *Hunter,* 65 F. Supp. 319 (D. C. Kan. 1946). See also 1 W. Barron & A. Holtzoff, Federal Practice and Procedure § 131 (C. Wright ed. 1960); Note, Civil Discovery in Habeas Corpus, 67 Col. L. Rev. 1296, 1299 (1967). The applicability to habeas corpus of the rules concerning joinder and class actions has engendered considerable debate. See *Mitchell* v. *Schoonfield,*

Such specific evidence as there is with respect to the intent of the draftsmen of the rules indicates nothing more than a general and nonspecific understanding that the rules would have very limited application to habeas corpus proceedings. At the very least, it is clear that there was no intention to extend to habeas corpus, as a matter of right, the broad discovery provisions which, even in ordinary civil litigation, were "one of the most significant innovations" of the new rules. *Hickman* v. *Taylor,* 329 U. S. 495, 500 (1947). Walker does not claim that there was any general discovery practice in habeas corpus proceedings prior to adoption of the Federal Rules of Civil Procedure.

In considering the intended application of the new rules to habeas corpus, it is illuminating to note that in 1938 the expansion of federal habeas corpus to its present scope was only in its early stages. *Mooney* v. *Holohan,* 294 U. S. 103 (1935); *Johnson* v. *Zerbst,* 304 U. S. 458 (1938); *Waley* v. *Johnston,* 316 U. S. 101 (1942). It was not until many years later that the federal courts considering a habeas corpus petition were held to be required in many cases to make an independent determination of the factual basis of claims that state convictions had violated the petitioner's federal constitutional rights. *Brown* v. *Allen,* 344 U. S. 443 (1953); *Townsend* v. *Sain,* 372 U. S. 293 (1963). In these circumstances it is readily understandable that, as indicated by the language and the scanty contemporary exegesis of Rule 81 (a)(2) which is available, the drafts-

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285 F. Supp. 728 (D. C. Md. 1968); *Hill* v. *Nelson,* 272 F. Supp. 790 (D. C. N. D. Calif. 1967); *Adderly* v. *Wainwright,* 272 F. Supp. 530 (D. C. M. D. Fla. 1967). Cf. Note, Multiparty Federal Habeas Corpus, 81 Harv. L. Rev. 1482 (1968). The only issue before the Court in this case is the applicability to habeas corpus proceedings of those rules which deal with discovery. We intimate no view on whether the Federal Rules may be applicable with respect to other aspects of a habeas corpus proceeding.

men of the rule did not contemplate that the discovery provisions of the rules would be applicable to habeas corpus proceedings.

It is also of some relevance that in 1948, when Congress enacted 28 U. S. C. § 2246 expressly referring to the right of parties in habeas corpus proceedings to propound written interrogatories, its legislation was limited to interrogatories for the purpose of obtaining evidence from affiants where affidavits were admitted in evidence. Again, the restricted scope of this legislation indicates that the adoption in 1938 of the Federal Rules of Civil Procedure was not intended to make available in habeas corpus proceedings the discovery provisions of those rules.

Indeed, it is difficult to believe that the draftsmen of the Rules or Congress would have applied the discovery rules without modification to habeas corpus proceedings because their specific provisions are ill-suited to the special problems and character of such proceedings. For example, Rule 33, which Walker here invoked, provides for written interrogatories to be served by any party upon any "adverse party." As the present case illustrates, this would usually mean that the prisoner's interrogatories must be directed to the warden although the warden would be unable to answer from personal knowledge questions relating to petitioner's arrest and trial. Presumably the warden could solicit answers from the appropriate officials and reply "under oath," as the rule requires; but the warden is clearly not the kind of "adverse party" contemplated by the discovery rules, and the result of their literal application would be to invoke a procedure which is circuitous, burdensome, and time consuming.

The scope of interrogatories which may be served under Rule 33 also indicates the unsuitability of applying to habeas corpus provisions which were drafted without reference to its peculiar problems.

By reference to Rule 26 (b), the rule would give the prisoner a right to inquire into "any matter, not privileged, which is relevant to the subject matter involved in the pending action," whether admissible at trial or not. This rule has been generously construed to provide a great deal of latitude for discovery. See *Hickman* v. *Taylor, supra,* at 507; 2A Barron & Holtzoff, *supra,* § 646. Such a broad-ranging preliminary inquiry is neither necessary nor appropriate in the context of a habeas corpus proceeding.

Except for interrogatories to be served by the "plaintiff" within 10 days after the commencement of "the action," Rule 33 provides that the interrogatories may be served without leave of court. The "adverse party" must then take the initiative to contest the interrogatories and a hearing in court on his objections is required. Unavoidably, unless there is a measure of responsibility in the originator of the proceeding, the "plaintiff" or petitioner, this procedure can be exceedingly burdensome and vexatious. The interrogatory procedure would be available to the prisoners themselves since most habeas petitions are prepared and filed by prisoners, generally without the guidance or restraint of members of the bar. For this reason, too, we conclude that the literal application of Rule 33 to habeas corpus proceedings would do violence to the efficient and effective administration of the Great Writ. The burden upon courts, prison officials, prosecutors, and police, which is necessarily and properly incident to the processing and adjudication of habeas corpus proceedings, would be vastly increased; and the benefit to prisoners would be counterbalanced by the delay which the elaborate discovery procedures would necessarily entail.

It is true that the availability of Rule 33 would provide prisoners with an instrument of discovery which could be activated on their own initiative, without prior court approval, and that this would be of considerable tactical advantage to them in the prosecution of their efforts to demonstrate such error in their trial as would result in their release. But despite the forceful and ingenious argument of Walker's counsel and *amici curiae,*[6] this consideration cannot carry the day. It is a long march from this contention to a conclusion that the discovery provisions of the Federal Rules of Civil Procedure were intended to extend to habeas corpus proceedings. We have no power to rewrite the Rules by judicial interpretations. We have no power to decide that Rule 33 applies to habeas corpus proceedings unless, on conventional principles of statutory construction, we can properly conclude that the literal language or the intended effect of the Rules indicates that this was within the purpose of the draftsmen or the congressional understanding.

IV.

To conclude that the Federal Rules' discovery provisions do not apply completely and automatically by virtue of Rule 81 (a)(2) is not to say that there is no way in which a district court may, in an appropriate case, arrange for procedures which will allow development, for purposes of the hearing, of the facts relevant to disposition of a habeas corpus petition. Petitioners in habeas corpus proceedings, as the Congress and this Court have emphasized, and as we have discussed, *supra,* at 290–292, are entitled to careful consideration and plenary processing of their claims including full opportunity for presentation of the relevant facts. Congress has provided that once a petition for a writ of habeas corpus is filed, unless the court is of the opinion that the petitioner is not entitled to an order to show cause, the writ must be awarded "forthwith," or an order to show cause must be issued. 28 U. S. C. § 2243. Thereafter, if the court concludes that the petitioner is entitled to an evidentiary hearing, cf. *Townsend* v. *Sain, supra;* 28 U. S. C. § 2254, it shall order one to be held promptly. 28 U. S. C. § 2243.

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[6] In our consideration of this case, we have been assisted greatly by the briefs of the *amici curiae*—the NAACP Legal Defense and Educational Fund and the National Office for the Rights of the Indigent in support of petitioner, and the United States and the State of New York in support of respondent.

Flexible provision is made for taking evidence by oral testimony, by deposition, or upon affidavit and written interrogatory. 28 U. S. C. § 2246. Cf. §§ 2245, 2254 (e). The court shall "summarily hear and determine the facts, and dispose of the matter as law and justice require." 28 U. S. C. § 2243. But with respect to methods for securing facts where necessary to accomplish the objective of the proceedings Congress has been largely silent. Clearly, in these circumstances, the habeas corpus jurisdiction and the duty to exercise it being present, the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage. Where their duties require it, this is the inescapable obligation of the courts. Their authority is expressly confirmed in the All Writs Act, 28 U. S. C. § 1651. This statute has served since its inclusion, in substance, in the original Judiciary Act as a "legislatively approved source of procedural instruments designed to achieve 'the rational ends of law.'" *Price* v. *Johnston,* 334 U. S. 266, 282 (1948), quoting *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 273 (1942). It has been recognized that the courts may rely upon this statute in issuing orders appropriate to assist them in conducting factual inquiries. *American Lithographic Co.* v. *Werckmeister,* 221 U. S. 603, 609 (1911) (subpoenas *duces tecum*); *Bethlehem Shipbuilding Corp.* v. *NLRB,* 120 F. 2d 126, 127 (C. A. 1st Cir. 1941) (order that certain documents be produced for the purpose of pretrial discovery). In *Price* v. *Johnston, supra,* this Court held explicitly that the purpose and function of the All Writs Act to supply the courts with the instruments needed to perform their duty, as prescribed by the Congress and the Constitution, provided only that such instruments are "agreeable" to the usages and principles of law, extend to habeas corpus proceedings.

At any time in the proceedings, when the court considers that it is necessary to do so in order that a fair and meaningful evidentiary hearing may be held so that the court may properly "dispose of the matter as law and justice require," either on its own motion or upon cause shown by the petitioner, it may issue such writs and take or authorize such proceedings with respect to development, before or in conjunction with the hearing of the facts relevant to the claims advanced by the parties, as may be "necessary or appropriate in aid of [its jurisdiction] . . . and agreeable to the usages and principles of law." 28 U. S. C. § 1651.

We do not assume that courts in the exercise of their discretion will pursue or authorize pursuit of all allegations presented to them. We are aware that confinement sometimes induces fantasy which has its basis in the paranoia of prison rather than in fact. But where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry. Obviously, in exercising this power, the court may utilize familiar procedures, as appropriate, whether these are found in the civil or criminal rules or elsewhere in the "usages and principles of law."[7]

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[7] MR. JUSTICE HARLAN, dissenting, agrees that district courts have power to require discovery when essential to render a habeas corpus proceeding effective. He dissents because he would substitute the judgment of this remote Court for that of the District Court

Accordingly, we reverse the judgment of the Court of Appeals for the Ninth Circuit and remand the case for further proceedings in accordance with this opinion.

Reversed and remanded.

MR. JUSTICE BLACK, dissenting.

I would affirm the Court of Appeals' holding in this case, *Wilson* v. *Harris*, 378 F. 2d 141, that 28 U. S. C. § 2246 does not authorize discovery in habeas corpus proceedings. Upon affirmance I would not go further and write what appears to me to be in effect an advisory opinion directing the trial court to formulate some kind of new legal system for discovery in this kind of case. Fully agreeing with the Court's statement that "[w]e have no power to rewrite the Rules by judicial interpretations," I go further and doubt that we have power to

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as to the need for authorizing discovery in this case. MR. JUSTICE HARLAN then expresses his views as to the desirability of formulating discovery rules under 28 U. S. C. § 2072, applicable to federal habeas and § 2255 proceedings. In our view, the desirability of launching rule-making proceedings does not and could not affect the decision in the present case.

In view of his remarks, however, we have concluded that we should express agreement with our Brother HARLAN as to the desirability of rule making in this field. We repeat that it does not follow from this that district judges are without power to enter necessary orders in the absence of rules.

In fact, it is our view that the rule-making machinery should be invoked to formulate rules of practice with respect to federal habeas corpus and § 2255 proceedings, on a comprehensive basis and not merely one confined to discovery. The problems presented by these proceedings are materially different from those dealt with in the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, and reliance upon usage and the opaque language of Civil Rule 81 (a)(2) is transparently inadequate. In our view the results of a meticulous formulation and adoption of special rules for federal habeas corpus and § 2255 proceedings would promise much benefit.

direct lower courts to write new laws providing for discovery in habeas corpus cases. This is a complicated field of law making and I think we should not enter this field in the absence of some valid delegation of legislative power by the Congress. Since I cannot agree that Congress has granted us such power, I am unable to go along with the Court's opinion.

There have been many complaints among members of the bar about many Court-made rules of procedure and I would venture the suggestion that in no field have the number of those complaints exceeded the complaints in this particular field of discovery. I regret that I cannot "assume," with the Court, that given blanket authority, "courts in the exercise of their discretion will [not] pursue or authorize pursuit of all allegations presented to them." This case makes me skeptical about such an assumption. Here Walker was convicted in a state court of having marihuana in his possession. After exhausting all state remedies he asked the federal courts to let him out of jail. He apparently did not allege his innocence, does not now do so, and this Court apparently does not now consider the question of guilt or innocence in this case. What he does allege is that the trial court made an error in admitting certain evidence against him. It is not alleged that the evidence was not relevant against him or that the verdict resting on that evidence was not a truthful, honest verdict. We must, therefore, assume that he was and is guilty of the crime of which he was convicted. See my dissent in *Kaufman* v. *United States, ante,* p. 231, decided today. What *is* relevant, however, and all that is alleged, is that the evidence used against him, presumably the marihuana, was found on his premises as the result of a search made after a statement by a person to a policeman, which statement the allegations now charge "was not shown to have been reliable" and which was made by a person "who was in fact unreliable." It may be possible that a new trial over this issue can establish that the person telling the officer that marihuana could be found on Walker's premises was an "unreliable" person and that the statement he made was also "unreliable." But the fact remains that the marihuana was found where the unreliable person's unreliable statement told the officer it would be found. Consequently it appears to me that the present case against a defendant whose guilt has been proved to a jury beyond a reasonable doubt should not be taken as an appropriate one on which this Court lays the groundwork for a new and vast judicial legislative rule-making program.

Perhaps it might not be considered amiss mildly to suggest that in cases like this, where records contain no question at all about guilt, some convictions should at some time be treated as final and no longer subject to challenge, at least by collateral attack. Although I admit that *Aguilar* v. *Texas,* 378 U. S. 108 (1964), *Spinelli* v. *United States,* 393 U. S. 410 (1969), and other recent cases go a long way, I had not previously thought that even these cases could support what the Court is doing in this case.

MR. JUSTICE HARLAN, whom MR. JUSTICE WHITE joins, dissenting.

I agree that neither Rule 33 of the Federal Rules of Civil Procedure nor any statute authorizes the interrogatories sought in this case. I further agree that district courts do have power to require discovery when essential to render a habeas corpus proceeding effective. But I would make it explicit that such power is narrow and should be exercised sparingly, and would not set the district courts "at large," as I fear today's opinion may be taken to do.

I.

This case furnishes an apt illustration of the differences between my viewpoint and what seems to be that of the majority. As stated more fully in the Court's opinion, *ante*, at 288–289, Walker claimed that marihuana admitted at his trial was seized incident to an arrest which was based upon information supplied by an unreliable informant. After the District Court had ordered an evidentiary hearing, Walker directed to the respondent warden a series of interrogatories designed to establish the unreliability of the informant. The interrogatories asked whether the officer who arrested Walker had made previous arrests or searches on the basis of information given by the same informant; if so, whether such arrests or searches resulted in convictions; and whether the informant had ever supplied information which the officer considered unreliable.

It seems apparent that this discovery was not essential to an adequate habeas proceeding. All of the information sought was known to the arresting officer. Walker knew the officer's identity; in fact, the officer had testified at the preliminary hearing and at trial on the very issue of the informant's reliability. Hence, there is no reason to believe that all of the information could not have been obtained by calling the officer as a witness at the habeas hearing. Although I realize that the parties have not directed their arguments to this precise question, I am satisfied that on the face of things Walker cannot possibly show that this discovery is essential to a fair proceeding. Accordingly, I would affirm outright the judgment of the Court of Appeals.[1]

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[1] My Brother STEWART bases his dissent in this case upon my own dissenting opinion in *Kaufman* v. *United States*, *ante*, p. 242, in which I have taken the position that in actions brought

II.

The more troublesome aspect of the Court's opinion is its long-run implications. For it can be taken as suggesting that the best solution to the problem of discovery in habeas corpus proceedings is to permit each district court to devise "appropriate modes of procedure" on a case-by-case basis. As regards the immediate future, a case-by-case approach may be unavoidable, since there is at present no body of applicable discovery rules and the district courts must have power to order discovery which is essential to effective disposition of habeas applications. But I consider that from a broader standpoint the problem of habeas discovery should be dealt with not case by case but through exercise of our rule-making power. See 28 U. S. C. § 2072.

There are several reasons for believing that a case-by-case approach will be unsatisfactory in the long range. It seems to me that in fairness both to habeas petitioners and to their adversaries, the discovery procedures which are available in such actions should be uniform throughout the federal system and not dependent upon the vary-

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by federal prisoners under 28 U. S. C. § 2255 Fourth Amendment claims should be entertained only upon a showing of "special circumstances." I prefer to rest my disagreement with the result in this case upon other grounds, for two reasons. First, this case is not on all fours with *Kaufman,* since this was a federal habeas action by a state prisoner rather than an action by a federal prisoner under § 2255. The *Kaufman* question has not been briefed or argued in this case, and there may conceivably be significant distinctions between the two types of proceedings. See, *e. g.*, Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U. Pa. L. Rev. 378 (1964). Second, although this case happens, like *Kaufman,* to involve a search-and-seizure issue, the Court's reasoning here plainly applies to all claims cognizable on federal habeas corpus. Hence, it seems appropriate to rest my dissent upon broader grounds, which also appeal to my Brother WHITE.

ing "discovery attitudes" of particular district judges. If discovery procedures are developed case by case, there will at the least be a very long period during which procedures will differ from district to district. Even assuming that a coherent body of rules finally will emerge because of the unifying influence of appellate decisions, it is unlikely that the rules thus generated will be the best that could have been devised. Appellate courts, including this one, are imperfectly informed both about the extent of the need for additional discovery in habeas corpus and about the procedures best suited to meet those needs and to achieve prompt dispatch of habeas proceedings. They are, therefore, poorly situated to lay down guidelines for the district courts. Moreover, discovery rules fashioned in the course of day-to-day adjudication are likely to suffer from the limitations which accompany that process.

Such considerations lead me to think that, in the longer view, the formulation of discovery rules can best be accomplished through use of the power which Congress has conferred upon us to establish general rules governing civil procedure in the federal district courts. By using this method of rule making, the advice of the Judicial Conference of the United States and its appropriate advisory committees could be obtained.[2] These bodies are well equipped to assess the dimensions of the discovery problem and devise apt solutions. Their deliberations would be free from the time pressures and piecemeal character of case-by-case adjudication. And the resulting rules would be uniform throughout the federal system.

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[2] For a brief account of the role played by these bodies in the making of civil rules, see Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 357–358 (1967).

My conviction that this would be the best course is strengthened by recollection of our decision in *Miner* v. *Atlass,* 363 U. S. 641 (1960), and the events which followed. In *Miner* we held that a District Court sitting in admiralty had no power to order the taking of an oral discovery deposition. Responding to a suggestion in our opinion, see 363 U. S., at 651, and to earlier stirrings at the bar, the Judicial Conference and the Advisory Committee on General Admiralty Rules swiftly proposed new Admiralty Rules authorizing certain additional kinds of discovery, including oral depositions. After approval by this Court and submission to Congress, as required by statute,[3] the new Admiralty Rules went into effect a little more than a year after our decision.[4] There is no reason to think that the Judicial Conference and the advisory committees would not be equally cooperative in this instance.

For the reasons stated in Part I of this opinion, I would affirm the judgment of the Court of Appeals in this case.

MR. JUSTICE STEWART, dissenting.

I concur with most of what is said in the Court's opinion, but cannot concur in its judgment.

I wholly agree that Rule 33 is inapplicable to habeas corpus proceedings. Contrary to my Brother HARLAN, I further agree that federal judges in carrying out their duty to dispose of habeas corpus applications "as law and justice require," 28 U. S. C. § 2243, should not be inhibited by inflexibly formalized procedural rules. In getting at the facts in such cases, the district courts should be given wide leeway for "discretion to exercise their common sense." *Machibroda* v. *United States,* 368 U. S. 487, 495.*

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[3] See 28 U. S. C. § 2072, which also specifies that the proposed rules shall not take effect for 90 days after they have been reported to Congress.

[4] See Admiralty Rules 30A–30G, 32, 32B–32D, which were either added or amended effective July 19, 1961.

However, for the reasons stated in MR. JUSTICE HARLAN's dissenting opinion today in *Kaufman* v. *United States, ante,* p. 242, which I have joined, I would affirm the judgment in the present case.

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*The *Machibroda* case arose under 28 U. S. C. § 2255, the statutory counterpart of habeas corpus. In the circumstances there presented, we pointed out that "many of the material allegations can either be corroborated or disproved by the visitors' records of the county jail where the petitioner was confined, the mail records of the penitentiary to which he was sent, and other such sources." 368 U. S., at 495.

DuVERNAY *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 814. Argued February 27, 1969.—Decided March 24, 1969.

394 F. 2d 979, affirmed by an equally divided Court.

Benjamin E. Smith argued the cause for petitioner. With him on the brief were *Arthur Kinoy* and *Morton Stavis.*

John S. Martin, Jr., argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Philip R. Monahan.*

Ann Fagan Ginger filed a brief for the National Lawyers Guild as *amicus curiae* urging reversal.

PER CURIAM.

The judgment is affirmed by an equally divided Court.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

GIORDANO *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 28. Decided March 24, 1969.*

The cases are remanded to the District Courts for further proceedings in conformity with *Alderman* v. *United States, ante,* p. 165.

No. 84, certiorari granted as to petitioner Franzese only and denied as to the others; 392 F. 2d 954, vacated in part and remanded. No. 317, certiorari granted as to petitioners Mirro and McDonnell and denied as to the others; 396 F. 2d 283, vacated in part and remanded. In the following cases certiorari granted and the judgments below vacated and remanded: No. 28, 385 F. 2d 988; No. 54, 390 F. 2d 244; Nos. 106 and 168, 394 F. 2d 304 and 327; No. 124, 393 F. 2d 597; No. 129, 395 F. 2d 47; No. 271, 397 F. 2d 901; Nos. 474 and 715, 401 F. 2d 664; No. 546, 398 F. 2d 291; No. 668, 401 F. 2d 259; and Nos. 895 and 911, 402 F. 2d 380.

Carlton Roeser for petitioner in No. 28. *Irving Anolik* for petitioner in No. 54. *Maurice Edelbaum* for petitioner Franzese, *William L. Lynch* for petitioner Crabbe, *Raymond A. Brown* for petitioner Matera, and *Peter L. F. Sabbatino* for petitioner Potere in No. 84. *Raymond J.*

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*Together with No. 54, *Scandifia* v. *United States;* No. 84, *Franzese et al.* v. *United States;* No. 106, *Evans* v. *United States;* No. 124, *Aiuppa* v. *United States;* No. 129, *Amabile* v. *United States;* No. 168, *Battaglia* v. *United States;* No. 271, *Clay, aka Ali* v. *United States;* No. 317, *Di Pietto et al.* v. *United States;* No. 474, *Natarelli* v. *United States;* No. 546, *Hoffa et al.* v. *United States;* No. 668, *Stassi* v. *United States;* No. 715, *Randaccio* v. *United States;* No. 895, *Hoffa et al.* v. *United States;* and No. 911, *Dranow* v. *United States,* also on petitions for writs of certiorari. Nos. 54, 84, 474, and 715 are to the United States Court of Appeals for the Second Circuit; Nos. 271 and 668 are to the Court of Appeals for the Fifth Circuit; No. 546 is to the Court of Appeals for the Sixth Circuit; Nos. 106, 129, 168, 317, 895, and 911 are to the Court of Appeals for the Seventh Circuit; and No. 124 is to the Court of Appeals for the Tenth Circuit.

Smith and *Morris A. Haft* for petitioner in No. 106. *Maurice J. Walsh* and *John Powers Crowley* for petitioner in No. 124. *Charles A. Bellows* for petitioner in No. 129. *Edward Bennett Williams, Harold Ungar, Steven M. Umin,* and *Mr. Walsh* for petitioner in No. 168. *Charles Morgan, Jr., Howard Moore, Jr., George Pontikes, Marvin Karpatkin, Melvin L. Wulf,* and *Eleanor H. Norton* for petitioner in No. 271. *Edward J. Calihan, Jr., Mr. Crowley,* and *Robert S. Bailey* for petitioners in No. 317. *Anthony J. DeMarie* for petitioner in No. 474. *Morris A. Shenker, Joseph A. Fanelli, Jacques M. Schiffer, Cecil D. Branstetter,* and *Daniel B. Maher* for petitioners in No. 546. *Clyde W. Woody* and *Marian S. Rosen* for petitioner in No. 668. *Herald Price Fahringer* and *Frank G. Raichle* for petitioner in No. 715. *Messrs. Walsh* and *Shenker* for petitioner Hoffa, *George Callaghan* for petitioner Strate, *Richard E. Gorman* for petitioner Burris, *Mr. Schiffer* for petitioner Weinblatt, and *Harvey M. Silets* for petitioner Kovens in No. 895. *Frank Ragano* for petitioner in No. 911.

Solicitor General Griswold for the United States in No. 28. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Sidney M. Glazer* for the United States in No. 54. *Solicitor General Griswold, Assistant Attorney General Vinson, Miss Rosenberg,* and *Roger A. Pauley* for the United States in Nos. 84, 271, and 317. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Miss Rosenberg* for the United States in Nos. 106, 129, and 168. *Solicitor General Griswold, Assistant Attorney General Vinson, Miss Rosenberg,* and *Leonard H. Dickstein* for the United States in No. 124. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Mr. Glazer* for the United States in No. 474. *Solicitor General Griswold, Assistant Attorney General Vinson,* *Theodore George Gilinsky*, and *Mr. Pauley* for the United States in No. 546. *Solicitor General Griswold, Assistant Attorney General Vinson, Miss Rosenberg,* and *Paul C. Summitt* for the United States in No. 668. *Solicitor General Griswold, Assistant Attorney General Wilson, Mr. Feit,* and *Kirby W. Patterson* for the United States in No. 715. *Solicitor General Griswold, Assistant Attorney General Wilson, Miss Rosenberg,* and *Mr. Feit* for the United States in Nos. 895 and 911.

PER CURIAM.

The petitions for writs of certiorari are granted, except that in No. 84 the writ is granted as to petitioner Franzese only and denied as to the other petitioners, and in No. 317 the petition is granted as to petitioners Mirro and McDonnell only and denied as to the other petitioners.[†] The judgments of the Courts of Appeals in these cases are vacated, and the cases remanded to the respective District Courts for further proceedings in conformity with *Alderman* v. *United States, Ivanov* v. *United States,* and *Butenko* v. *United States, ante,* p. 165. It is not evident from the records in some of these cases whether the surveillances at issue were unlawful. It may be that the overhearings in some instances were not achieved by trespass, see *Katz* v. *United States,* 389 U. S. 347 (1967); *Desist* v. *United States, ante,* p. 244, and *Kaiser* v. *New York, ante,* p. 280, or for some other reasons were not unlawful. As we held in *Alderman, Ivanov,* and *Butenko, ante,* at 170, n. 3, "the District Court must develop the relevant facts and decide if the Government's electronic surveillance was unlawful." Of course, a finding by the District Court that the surveillance was lawful would make disclosure and further proceedings unnecessary. Similarly, it is not clear that each petitioner has standing to assert the illegality of the surveillance or of the introduction of its fruits. As in *Alderman, Ivanov,* and *Butenko,* these issues are to be resolved by the District Courts in the first instance.

[†] We read the papers filed by the United States in these two cases as stating that the surveillances neither invaded the premises of the other petitioners nor overheard their conversations.

MR. JUSTICE BLACK dissents, except in Nos. 895 and 911, in the consideration and disposition of which he took no part.

MR. JUSTICE WHITE took no part in the consideration or disposition of Nos. 546, 895, and 911.

MR. JUSTICE MARSHALL took no part in the consideration or disposition of Nos. 28, 106, 129, 168, 271, 546, 895, and 911.

MR. JUSTICE STEWART, concurring.

A few words in amplification of this *per curiam* opinion may help to avoid misunderstanding on the part of the litigants, and of the District Courts to which these cases are remanded.

As we made explicit in *Alderman, Butenko,* and *Ivanov,* the requirement that certain products of governmental electronic surveillance be turned over to defense counsel was expressly limited to situations where the surveillance had violated the Fourth Amendment. We did not decide in those cases, and we do not decide in these, that any of the surveillances *did* violate the Fourth Amendment.[1]

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[1] In oral argument of the *Butenko* and *Ivanov* cases, the Solicitor General, mystifyingly, sought to concede that the surveillances there *were* in fact unconstitutional, although he was repeatedly invited

Instead, we have left that threshold question for the District Courts to decide in all these cases.

Moreover, we did not in *Alderman, Butenko,* or *Ivanov,* and we do not today, specify the procedure that the District Courts are to follow in making this preliminary determination. We have nowhere indicated that this determination cannot appropriately be made in *ex parte, in camera* proceedings. "Nothing in *Alderman* v. *United States, Ivanov* v. *United States,* or *Butenko* v. *United States, ante,* p. 165, requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance." *Taglianetti* v. *United States, post,* p. 316.

Finally, the Court has not in any of these cases addressed itself to the standards governing the constitutionality of electronic surveillance relating to the gathering of foreign intelligence information—necessary for the conduct of international affairs, and for the protection of national defense secrets and installations from foreign espionage and sabotage. MR. JUSTICE WHITE

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to argue that they were not. The following colloquies during oral argument of the *Ivanov* case are illustrative:

"Q. Are you asking us to decide here or to leave open on remand the question as to whether this violates, this bugging in this particular case, violates the Fourth Amendment?

"A. Our position would be the same had it or not. We are not arguing that it did not violate the Fourth Amendment.

. . . . .

"Q. In other words, the premise in which you are proceeding here is that you admit for the purposes of this case that this was illegal bugging?

"A. Yes, Mr. Justice.

. . . . .

"Q. And you are going to remain free to argue to the district judge that there was no violation?

"A. No, sir."

In deciding those cases, the Court declined to accept the Solicitor General's proffered concession.

has elsewhere made clear his view that such surveillance does not violate the Fourth Amendment, "if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable." [2] While two members of the Court have indicated disagreement with that view,[3] the issue remains open.[4]

One might suppose that all of this should be entirely clear to any careful reader of the Court's opinion in *Alderman, Butenko,* and *Ivanov.* Perhaps so, and perhaps, therefore, what I have said is quite unnecessary. But 10 years of experience here have taught me that the most carefully written opinions are not always carefully read—even by those most directly concerned.

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[2] *Katz* v. *United States,* 389 U. S. 347, 364 (WHITE, J., concurring).

[3] *Id.,* at 359 (DOUGLAS, J., concurring).

[4] See *id.,* at 358, n. 23.

TAGLIANETTI *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 446. Decided March 24, 1969.

The Government purportedly furnished petitioner, who has been convicted of income tax violations, all of his own conversations which had been overheard by unlawful electronic surveillance, and the District Court examined all the records *in camera* to ascertain if the Government had correctly identified petitioner's voice and had turned over all his conversations. *Held: Alderman* v. *United States, ante,* p. 165, requires an adversary proceeding only where *in camera* procedures are inadequate to safeguard a defendant's Fourth Amendment rights, but here it cannot be said that "the task is too complex, and the margin of error too great, to rely wholly on the *in camera* judgment of the trial court."

Certiorari granted; 398 F. 2d 558, affirmed.

Raymond LaFazia for petitioner.

Solicitor General Griswold and *Assistant Attorney General Rogovin* for the United States.

PER CURIAM.

The petition for certiorari is granted and the judgment of the Court of Appeals is affirmed.[1] Following a jury trial in the District Court, petitioner was convicted on three counts of wilfully attempting to evade his income tax for the years 1956, 1957, and 1958. Following a remand to the District Court, the Court of Appeals affirmed the convictions. In the District Court on remand, the Government purported to turn over to petitioner all of his own conversations which had been overheard by means of unlawful electronic surveillance.[2] Petitioner argues that he was entitled to examine additional surveillance records because neither the Government nor the District Court was able to determine with certainty which conversations petitioner had been a party to. In fact, the District Court examined all the records *in camera* to ascertain if the Government had correctly identified petitioner's voice and had turned over to petitioner each conversation in which he had participated.

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[1] Although this petition for certiorari was not filed within the 30 days allowed by the Court's Rule 22 (2), the time limitation is not jurisdictional, *Heflin* v. *United States,* 358 U. S. 415, 418, n. 7 (1959), and does not bar our exercise of discretion to consider this case.

Nothing in *Alderman* v. *United States, Ivanov* v. *United States,* or *Butenko* v. *United States, ante,* p. 165, requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance. On the contrary, an adversary proceeding and disclosure were required in those cases, not for lack of confidence in the integrity of government counsel or the trial judge, but only because the *in camera* procedures at issue there would have been an inadequate means to safeguard a defendant's Fourth Amendment rights. Here the defendant was entitled to see a transcript of his own conversations and nothing else. He had no right to rummage in government files. The trial court was asked to identify only those instances of surveillance which petitioner had standing to challenge under the Fourth Amendment exclusionary rule and to double-check the accuracy of the Government's voice identifications. Under the circumstances presented here, we cannot hold that "the task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court." *Alderman* v. *United States, supra,* at 182.

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[2] Petitioner sought disclosure only of his own conversations and apparently lacks standing as to any others. "We do not understand appellant to argue that he has a right to inspect logs or memos of conversations in which he was not a participant. Indeed, that point he wisely conceded before the district court." 398 F. 2d 558, 571.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE MARSHALL took no part in the consideration or disposition of this case.

SHAKESPEARE ET AL. *v.* ZERVOS.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 823. Decided March 24, 1969.

262 Cal. App. 2d 171, 68 Cal. Rptr. 481, appeal dismissed and certiorari denied.

PER CURIAM.

The motions to dispense with printing the jurisdictional statement and for leave to file a supplemental jurisdictional statement are granted. The motion for transmittal of exhibits is denied.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MAYHUE'S SUPER LIQUOR STORES, INC. *v.* MEIKLEJOHN, DIRECTOR, BEVERAGE DEPARTMENT OF FLORIDA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 904. Decided March 24, 1969.

Appeal dismissed.

Daniel S. Pearson for appellant.

T. T. Turnbull, Assistant Attorney General of Florida, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.

WOODS *v.* CALIFORNIA.

APPEAL FROM THE APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES.

No. 1006. Decided March 24, 1969.

Appeal dismissed.

Burton Marks for appellant.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

BOEING CO. *v.* HAMM, COMMISSIONER OF REVENUE OF ALABAMA.

APPEAL FROM THE SUPREME COURT OF ALABAMA.

No. 1017. Decided March 24, 1969.

283 Ala. 310, 216 So. 2d 288, appeal dismissed.

John Bingham for appellant.

MacDonald Gallion, Attorney General of Alabama, and *Willard W. Livingston* and *William H. Burton,* Assistant Attorneys General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

IN RE GROSS.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 1035. Decided March 24, 1969.

Appeal dismissed.

Burton Marks for appellant.

Roger Arnebergh, Philip E. Grey, and *Michael T. Sauer* for the State of California.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

FEDERAL-BRYANT MACHINERY CO. *v.* DEPARTMENT OF REVENUE OF ILLINOIS.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 1069. Decided March 24, 1969.

41 Ill. 2d 64, 241 N. E. 2d 857, appeal dismissed.

Harry H. Ruskin for appellant.

William J. Scott, Attorney General of Illinois, and *Francis T. Crowe,* Assistant Attorney General, for appellee.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

McINNIS ET AL. *v.* OGILVIE, GOVERNOR OF ILLINOIS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 1033. Decided March 24, 1969.

293 F. Supp. 327, affirmed.

Stanley A. Bass for appellants.

William J. Scott, Attorney General of Illinois, and *Francis T. Crowe,* Assistant Attorney General, for appellees.

Arthur H. Dean, Louis F. Oberdorfer, Frederick A. Ballard, John B. Jones, Jr., and *William B. Beebe* for the Urban Coalition et al. as *amici curiae,* and *Joseph L. Rauh, Jr., John Silard, Elliott C. Lichtman, Benjamin V. Cohen, J. Albert Woll, Thomas E. Harris, John Ligtenberg, Stephen I. Schlossberg, Derrick A. Bell, Jr.,* and *Harold W. Horowitz* for the American Federation of Labor-Congress of Industrial Organizations et al. as *amici curiae.* Briefs of *amici curiae* were also filed by San Francisco Neighborhood Legal Assistance Foundation et al. and by Coons et al.

PER CURIAM.

The motions of Urban Coalition et al., American Federation of Labor-Congress of Industrial Organizations et al., John E. Coons et al., and San Francisco Neighborhood Legal Assistance Foundation et al., for leave to file briefs as *amici curiae* are granted.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and the case set for oral argument.

CAMPBELL *v.* WASHINGTON STATE BAR ASSN.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 1324, Misc. Decided March 24, 1969.

74 Wash. 2d 276, 444 P. 2d 784, appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

OROZCO *v.* TEXAS.

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 641. Argued February 26, 1969.—Decided March 25, 1969.

Use of admissions at petitioner's trial for murder which were obtained by officers who, while he was in their custody in his bedroom at the boardinghouse where he lived, questioned him about incriminating facts without first informing him of his rights to remain silent, to have a lawyer's advice before making a statement, and to have a lawyer appointed to assist him if he could not afford to hire one, *held* to have violated Self-Incrimination Clause of Fifth Amendment made applicable to the States by the Fourteenth. *Miranda* v. *Arizona,* 384 U. S. 436 (1966). Pp. 326–327.

428 S. W. 2d 666, reversed.

Charles W. Tessmer argued the cause and filed a brief for petitioner.

Lonny F. Zwiener, Assistant Attorney General of Texas, argued the cause for respondent. With him on the brief were *Crawford C. Martin,* Attorney General, *Nola White,* First Assistant Attorney General, *Hawthorne Phillips,* Executive Assistant Attorney General, *Robert C. Flowers,* Assistant Attorney General, and *W. V. Geppert.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner, Reyes Arias Orozco, was convicted in the Criminal District Court of Dallas County, Texas, of murder without malice and was sentenced to serve in the state prison not less than two nor more than 10 years. The Court of Criminal Appeals of Texas affirmed the conviction, rejecting petitioner's contention that a material part of the evidence against him was obtained in violation of the provision of the Fifth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, that: "No person . . . shall be compelled in any criminal case to be a witness against himself."[1]

The evidence introduced at trial showed that petitioner and the deceased had quarreled outside the El Farleto Cafe in Dallas shortly before midnight on the date of the shooting. The deceased had apparently spoken to petitioner's female companion inside the restaurant. In the heat of the quarrel outside, the deceased is said to have beaten petitioner about the face and called him "Mexican Grease." A shot was fired killing the deceased. Petitioner left the scene and returned to his boardinghouse to sleep. At about 4 a. m. four police officers arrived at petitioner's boardinghouse, were admitted by an unidentified woman, and were told that petitioner was asleep in the bedroom. All four officers entered the bedroom and began to question petitioner. From the moment he gave his name, according to the testimony of one of the officers, petitioner was not free to go where he pleased but was "under arrest." The officers asked him if he had been to the El Farleto restaurant that night and when he answered "yes" he was asked if he owned a pistol. Petitioner admitted owning one. After being asked a second time where the pistol was located, he admitted that it was in the washing machine in a backroom of the boardinghouse. Ballistics tests indicated that the gun found in the washing machine was the gun that fired the fatal shot. At petitioner's trial, held after the effective date[2] of this Court's decision in *Miranda* v. *Arizona,* 384 U. S. 436 (1966), the trial court allowed one of the officers, over the objection of petitioner's lawyer,[3] to relate the statements made by petitioner concerning the gun and petitioner's presence at the scene of the shooting. The trial testimony clearly shows that the officers questioned petitioner about incriminating facts without first informing him of his right to remain silent, his right to have the advice of a lawyer before making any statement, and his right to have a lawyer appointed to assist him if he could not afford to hire one. The Texas Court of Criminal Appeals held, with one judge dissenting, that the admission of testimony concerning the statements petitioner had made without the above warnings was not precluded by *Miranda.* We disagree and hold that the use of these admissions obtained in the absence of the required warnings was a flat violation of the Self-Incrimination Clause of the Fifth Amendment as construed in *Miranda.*

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[1] The state court also rejected a contention that use of the evidence also violated the Fourth Amendment's provision against unreasonable searches and seizures. Our holding makes it unnecessary for us to consider that contention.

[2] See *Johnson* v. *New Jersey,* 384 U. S. 719 (1966).

The State has argued here that since petitioner was interrogated on his own bed, in familiar surroundings, our *Miranda* holding should not apply. It is true that the Court did say in *Miranda* that "compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery." 384 U. S., at 461. But the opinion iterated and reiterated the absolute necessity for officers interrogating people "in custody" to give the described warnings. See *Mathis* v. *United States,* 391 U. S. 1

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[3] The State appears to urge that petitioner's *Miranda* claim is unreviewable in this Court because the objection made by trial counsel to the officer's testimony was not sufficiently "specific." We fail to perceive how this could be an adequate state ground in view of the fact that the Texas Court of Criminal Appeals specifically decided that the introduction of petitioner's statement made to the officers "was not precluded under Miranda v. State of Arizona," 428 S. W. 2d 666, 672, while the dissenting judge thought that it was.

(1968). According to the officer's testimony, petitioner was under arrest and not free to leave when he was questioned in his bedroom in the early hours of the morning. The *Miranda* opinion declared that the warnings were required when the person being interrogated was "in custody at the station *or otherwise deprived of his freedom of action in any significant way.*" 384 U. S., at 477. (Emphasis supplied.) The decision of this Court in *Miranda* was reached after careful consideration and lengthy opinions were announced by both the majority and dissenting Justices. There is no need to canvass those arguments again. We do not, as the dissent implies, expand or extend to the slightest extent our *Miranda* decision. We do adhere to our well-considered holding in that case and therefore reverse [4] the conviction below.

Reversed.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN, concurring.

The passage of time has not made the *Miranda* case any more palatable to me than it was when the case was decided. See my dissenting opinion, and that of MR. JUSTICE WHITE, in *Miranda* v. *Arizona,* 384 U. S. 436, 504, 526 (1966).

Yet, despite my strong inclination to join in the dissent of my Brother WHITE, I can find no acceptable avenue of escape from *Miranda* in judging this case, especially in light of *Mathis* v. *United States,* 391 U. S. 1 (1968), which has already extended the *Miranda* rules beyond the police station, over the protest of JUSTICES STEWART, WHITE, and myself, *id.*, at 5–8. Therefore, and purely out of respect for *stare decisis,* I reluctantly feel compelled to acquiesce in today's decision of the Court, at the same time observing that the constitutional condemnation of this perfectly understandable, sensible, proper, and indeed commendable piece of police work highlights the unsoundness of *Miranda.*

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[4] In light of some apparent misunderstanding on this point, it is perhaps appropriate to point out once again that a reversal by this Court of a conviction based in part on unconstitutional evidence leaves the State free to retry the defendant without the tainted evidence.

MR. JUSTICE WHITE, with whom MR. JUSTICE STEWART joins, dissenting.

This decision carries the rule of *Miranda* v. *Arizona,* 384 U. S. 436 (1966), to a new and unwarranted extreme. I continue to believe that the original rule amounted to a "constitutional straitjacket" on law enforcement which was justified neither by the words or history of the Constitution, nor by any reasonable view of the likely benefits of the rule as against its disadvantages. 384 U. S., at 526. Even accepting *Miranda,* the Court extends the rule here and draws the straitjacket even tighter.

The opinion of the Court in *Miranda* was devoted in large part to an elaborate discussion of the subtle forms of psychological pressure which could be brought to bear when an accused person is interrogated at length in unfamiliar surroundings. The "salient features" of the cases decided in *Miranda* were "incommunicado interrogation of individuals in a police-dominated atmosphere." 384 U. S., at 445. The danger was that in such circumstances the confidence of the prisoner could be eroded by techniques such as successive interrogations by police acting out friendly or unfriendly roles. These techniques are best developed in "isolation and unfamiliar surroundings," 384 U. S., at 450. And they take time: "the major qualities an interrogator should possess are patience and perseverance." *Ibid.* The techniques of an extended period of isolation, repeated interrogation, cajolery, and trickery often enough produced admissions which were actually coerced in the traditional sense so that new safeguards were deemed essential.

It is difficult to believe that the requirements there laid down were essential to prevent compulsion in every conceivable case of station house interrogation. Where the defendant himself as a lawyer, policeman, professional criminal, or otherwise has become aware of what his right to silence is, it is sheer fancy to assert that his answer to every question asked him is compelled unless he is advised of those rights with which he is already intimately familiar. If there is any warrant to *Miranda* at all, it rests on the likelihood that in a sufficient number of cases exposure to station house practices will result in compelled confessions and that additional safeguards should be imposed in all cases to prevent possible erosion of Fifth Amendment values. Hence, the detailed ritual which *Miranda* fashioned.

The Court now extends the same rules to all instances of in-custody questioning outside the station house. Once arrest occurs, the application of *Miranda* is automatic. The rule is simple but it ignores the purpose of *Miranda* to guard against what was thought to be the corrosive influence of practices which station house interrogation makes feasible. The Court wholly ignores the question whether similar hazards exist or even are possible when police arrest and interrogate on the spot, whether it be on the street corner or in the home, as in this case. No predicate is laid for believing that practices outside the station house are normally prolonged, carried out in isolation, or often productive of the physical or psychological coercion made so much of in *Miranda*. It is difficult to imagine the police duplicating in a person's home or on the street those conditions and practices which the Court found prevalent in the station house and which were thought so threatening to the right to silence. Without such a demonstration, *Miranda* hardly reaches this case or any cases similar to it.

Here, there was no prolonged interrogation, no unfamiliar surroundings, no opportunity for the police to invoke those procedures which moved the majority in *Miranda*. In fact, the conversation was by all accounts a very brief one. According to uncontradicted testimony, petitioner was awake when the officers entered his room, and they asked him four questions: his name, whether he had been at the El Farleto, whether he owned a pistol, and where it was. He gave his name, said he had been at the El Farleto, and admitted he owned a pistol without hesitation. He was slow in telling where the pistol was, and the question was repeated. He then took the police to the nearby washing machine where the gun was hidden.

It is unquestioned that this sequence of events in their totality would not constitute coercion in the traditional sense or lead any court to view the admissions as involuntary within the meaning of the rules by which we even now adjudicate claims of coercion relating to pre-*Miranda* trials. And, realistically, had Orozco refused to answer the questions asked of him, it seems most unlikely that prolonged interrogation would have followed in petitioner's own quarters; nothing similar to the station house model invoked by the court would have occurred here. The police had petitioner's name and description, had ample evidence that he had been at the night club and suspected that he had a gun. Surely had he refused to give his name or answer any other questions, they would have arrested him anyway, searched the house and found the gun, which would have been clearly admissible under all relevant authorities. But the Court insists that this case be reversed for failure to give *Miranda* warnings.

I cannot accept the dilution of the custody requirements of *Miranda* to this level, where the hazards to the right to silence are so equivocal and unsupported by experience in a recurring number of cases. Orozco was apprehended in the most familiar quarters, the questioning was brief, and no admissions were made which were not backed up by other evidence. This case does not involve the confession of an innocent man, or even of a guilty man from whom a confession has been wrung by physical abuse or the modern psychological methods discussed in *Miranda.* These are simply the terse remarks of a man who has been caught, almost in the act. Even if there were reason to encourage suspects to consult lawyers to tell them to be silent before quizzing at the station house, there is no reason why police in the field should have to preface every casual question of a suspect with the full panoply of *Miranda* warnings. The same danger of coercion is simply not present in such circumstances, and the answers to the questions may as often clear a suspect as help convict him. If the *Miranda* warnings have their intended effect, and the police are able to get no answers from suspects, innocent or guilty, without arresting them, then a great many more innocent men will be making unnecessary trips to the station house. Ultimately it may be necessary to arrest a man, bring him to the police station, and provide a lawyer, just to discover his name. Even if the man is innocent the process will be an unpleasant one.

Since the Court's extension of *Miranda*'s rule takes it into territory where even what rationale there originally was disappears, I dissent.

Memorandum of MR. JUSTICE STEWART.

Although there is much to be said for MR. JUSTICE HARLAN's position, I join my Brother WHITE in dissent. It seems to me that those of us who dissented in *Miranda* v. *Arizona,* 384 U. S. 436, remain free not only to express our continuing disagreement with that decision, but also to oppose any broadening of its impact.

SNYDER *v.* HARRIS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 109. Argued January 21, 1969.—Decided March 25, 1969.*

Separate and distinct claims presented by and for various claimants in federal diversity actions may not be added together to provide the requisite $10,000 jurisdictional amount in controversy. Fed. Rule Civ. Proc. 23, as amended in 1966, did not change the scope of the statutory grant of district court jurisdiction, as the longstanding judicial interpretation of that statute cannot be changed by an amendment to the Rules, and there is no compelling reason for overturning settled judicial construction of "matter in controversy" in the light of consistent congressional re-enactment of that language against a background of judicial interpretation that the phrase does not encompass the aggregation of separate and distinct claims. Pp. 332–342.

No. 109, 390 F. 2d 204, affirmed; No. 117, 389 F. 2d 831, reversed.

Charles Alan Seigel argued the cause for petitioner in No. 109. With him on the brief was *Hyman G. Stein*. *Gerrit H. Wormhoudt* argued the cause for petitioner in No. 117. With him on the brief were *Kirke W. Dale* and *Dale M. Stucky*.

James L. Zemelman argued the cause for respondents in No. 109. With him on the brief was *Morris A. Shenker*. *Robert Martin* argued the cause for respondent in No. 117. With him on the brief were *D. Arthur Walker* and *Richard Cook*.

MR. JUSTICE BLACK delivered the opinion of the Court.

Title 28 U. S. C. § 1332 grants jurisdiction to United States district courts of suits between citizens of different States where "the matter in controversy exceeds the sum

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*Together with No. 117, *Gas Service Co.* v. *Coburn*, on certiorari to the United States Court of Appeals for the Tenth Circuit, argued on January 21–22, 1969.

or value of $10,000 . . . ." The issue presented by these two cases is whether separate and distinct claims presented by and for various claimants in a class action may be added together to provide the $10,000 jurisdictional amount in controversy.

Each of these cases involves a single plaintiff suing on behalf of himself and "all others similarly situated." In No. 109, Mrs. Margaret E. Snyder, a shareholder of Missouri Fidelity Union Trust Life Insurance Company, brought suit against members of the company's board of directors alleging that they had sold their shares of the company's stock for an amount far in excess of its fair market value, that this excess represented payment to these particular directors to obtain complete control of the company, and that under Missouri law the excess should properly be distributed among all the shareholders of the company and not merely to a few of them. The suit was brought in the United States District Court for the Eastern District of Missouri, diversity of citizenship being alleged as the basis for federal jurisdiction. Since petitioner's allegations showed that she sought for herself only $8,740 in damages, respondent moved to dismiss on the grounds that the matter in controversy did not exceed $10,000. Petitioner contended, however, that her claim should be aggregated with those of the other members of her class, approximately 4,000 shareholders of the company stock. If all 4,000 potential claims were aggregated, the amount in controversy would be approximately $1,200,000. The District Court held that the claims could not thus be aggregated to meet the statutory test of jurisdiction and the Court of Appeals for the Eighth Circuit, following a somewhat similar decision by the Court of Appeals for the Fifth Circuit in *Alvarez* v. *Pan American Life Insurance Co.*, 375 F. 2d 992, cert. denied, 389 U. S. 827 (1967), affirmed. 390 F. 2d 204 (1968).

In No. 117, Otto R. Coburn, a resident of Kansas, brought suit in the United States District Court for the District of Kansas against the Gas Service Company, a corporation marketing natural gas in Kansas. Jurisdiction was predicated upon diversity of citizenship. The complaint alleged that the Gas Service Company had billed and illegally collected a city franchise tax from Coburn and others living outside city limits. Coburn alleged damages to himself of only $7.81. Styling his complaint as a class action, however, Coburn sought relief on behalf of approximately 18,000 other Gas Service Company customers living outside of cities. The amount by which other members of the class had been overcharged was, and is, unknown, but the complaint alleged that the aggregation of all these claims would in any event exceed $10,000. The District Court overruled the Gas Company's motion to dismiss for failure to satisfy the jurisdictional amount and, on interlocutory appeal, the Court of Appeals for the Tenth Circuit affirmed, holding that because of a 1966 amendment to Rule 23 of the Federal Rules of Civil Procedure relating to class actions, separate and distinct claims brought together in a class action could now be aggregated for the purpose of establishing the jurisdictional amount in diversity cases. 389 F. 2d 831. We granted certiorari to resolve the conflict between the position of the Courts of Appeals for the Fifth and the Eighth Circuits and that of the Court of Appeals for the Tenth Circuit.

The first congressional grant to district courts to take suits between citizens of different States fixed the requirement for the jurisdictional amount in controversy at $500.[1] In 1887 this jurisdictional amount was increased to $2,000;[2] in 1911 to $3,000;[3] and in 1958 to $10,000.[4]

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[1] Section 11 of the Judiciary Act of 1789, 1 Stat. 78.

[2] Act of March 3, 1887, 24 Stat. 552.

[3] Act of March 3, 1911, § 24, 36 Stat. 1091.

[4] Act of July 25, 1958, 72 Stat. 415.

The traditional judicial interpretation under all of these statutes has been from the beginning that the separate and distinct claims of two or more plaintiffs cannot be aggregated in order to satisfy the jurisdictional amount requirement. Aggregation has been permitted only (1) in cases in which a single plaintiff seeks to aggregate two or more of his own claims against a single defendant and (2) in cases in which two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest. It is contended, however, that the adoption of a 1966 amendment to Rule 23 effectuated a change in this jurisdictional doctrine. Under old Rule 23, class actions were divided into three categories which came to be known as "true," "hybrid," and "spurious." True class actions were those in which the rights of the different class members were common and undivided; in such cases aggregation was permitted. Spurious class actions, on the other hand, were in essence merely a form of permissive joinder in which parties with separate and distinct claims were allowed to litigate those claims in a single suit simply because the different claims involved common questions of law or fact. In such cases aggregation was not permitted: each plaintiff had to show that his individual claim exceeded the jurisdictional amount. The 1966 amendment to Rule 23 replaced the old categories with a functional approach to class actions. The new Rule establishes guidelines for the appropriateness of class actions, makes provision for giving notice to absent members, allows members of the class to remove themelves from the litigation and provides that the judgment will include all members of the class who have not requested exclusion. In No. 117, Gas Service Company, the Court of Appeals for the Tenth Circuit held that these changes in Rule 23 changed the jurisdictional amount doctrine as well. The court noted that: "Because the claims of the individuals constituting the class in the case at bar are neither 'joint' nor 'common' this action under Rule 23 before amendment would not have been classified as a 'true' class action and aggregation of claims would not have been permitted." 389 F. 2d 831, 833. The Court of Appeals held, however, that a different result was compelled now that the amendment to Rule 23 abolished the distinctions between true and spurious class actions. The court held that because aggregation was permitted in some class actions, it must now be permitted in all class actions under the new Rule. We disagree and conclude, as did the Courts of Appeal for the Fifth and Eighth Circuits, that the adoption of amended Rule 23 did not and could not have brought about this change in the scope of the congressionally enacted grant of jurisdiction to the district courts.

The doctrine that separate and distinct claims could not be aggregated was never, and is not now, based upon the categories of old Rule 23 or of any rule of procedure. That doctrine is based rather upon this Court's interpretation of the statutory phrase "matter in controversy." The interpretation of this phrase as precluding aggregation substantially predates the 1938 Federal Rules of Civil Procedure. In 1911 this Court said in *Troy Bank* v. *Whitehead & Co.:*

> "When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount . . . ." 222 U. S. 39, 40.

By 1916 this Court was able to say in *Pinel* v. *Pinel,* 240 U. S. 594, that it was "settled doctrine" that separate and distinct claims could not be aggregated to meet the required jurisdictional amount. In *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583 (1939), this doctrine, which had first been declared in cases involving joinder of parties, was applied to class actions under the then recently passed Federal Rules. In that case numerous individuals, partnerships, and corporations joined in bringing a suit challenging the validity of a California statute which exacted fees of $15 on each automobile driven into the State. Raising the jurisdictional amount question *sua sponte,* this Court held that the claims of the various fee payers could not be aggregated "where there are numerous plaintiffs having no joint or common interest or title in the subject matter of the suit." 306 U. S., at 588. Nothing in the amended Rule 23 changes this doctrine. The class action plaintiffs in the two cases before us argue that since the new Rule will include in the judgment all members of the class who do not ask to be out by a certain date, the "matter in controversy" now encompasses all the claims of the entire class. But it is equally true that where two or more plaintiffs join their claims under the joinder provisions of Rule 20, each and every joined plaintiff is bound by the judgment. And it was in joinder cases of this very kind that the doctrine that distinct claims could not be aggregated was originally enunciated. *Troy Bank* v. *Whitehead & Co.,* 222 U. S. 39 (1911); *Pinel* v. *Pinel,* 240 U. S. 594 (1916). The fact that judgments under class actions formerly classified as spurious may now have the same effect as claims brought under the joinder provisions is certainly no reason to treat them *differently* from joined actions for purposes of aggregation.

Any change in the Rules that did purport to effect a change in the definition of "matter in controversy" would clearly conflict with the command of Rule 82 that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . . ." In *Sibbach* v. *Wilson & Co.,* this Court held that the rule-making authority was limited by "the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute." 312 U. S. 1, 10 (1941). We have consistently interpreted the jurisdictional statute passed by Congress as not conferring jurisdiction where the required amount in controversy can be reached only by aggregating separate and distinct claims. The interpretation of that statute cannot be changed by a change in the Rules.

For the reasons set out above, we think that it is unmistakably clear that the 1966 changes in Rule 23 did not and could not have changed the interpretation of the statutory phrase "matter in controversy." It is urged, however, that this Court should now overrule its established statutory interpretation and hold that "matter in controversy" encompasses the aggregation of all claims that can be brought together in a single suit, regardless of whether any single plaintiff has a claim that exceeds the required jurisdictional amount. It is argued in behalf of this position that (1) the determination of whether claims are "separate and distinct" is a troublesome question that breeds uncertainty and needless litigation, and (2) the inability of parties to aggregate numerous small claims will prevent some important questions from being litigated in federal courts. And both of these factors, it is argued, will tend to undercut the attempt of the Judicial Conference to promulgate efficient and modernized class action procedures. We think that whatever the merit of these contentions, they are not sufficient to justify our abandonment of a judicial interpretation of congressional language that has stood for more than a century and a half.

It is linguistically possible, of course, to interpret the old congressional phrase "matter in controversy" as including all claims that can be joined or brought in a single suit through the class action device. But, beginning with the first Judiciary Act in 1789 Congress has placed a jurisdictional amount requirement on access to the federal courts in certain classes of cases, including diversity actions. The initial requirement was $500 and a series of increases have, as pointed out above, finally placed the amount at $10,000. Congress has thus consistently amended the amount-in-controversy section and re-enacted the "matter-in-controversy" language without change of its jurisdictional effect against a background of judicial interpretation that has consistently interpreted that congressionally enacted phrase as not encompassing the aggregation of separate and distinct claims. This judicial interpretation has been uniform since at least the 1832 decision of this Court in *Oliver* v. *Alexander,* 6 Pet. 143. There are no doubt hazards and pitfalls involved in assuming that re-enactment of certain language by Congress always freezes the existing judicial interpretation of the statutes involved. Here, however, the settled judicial interpretation of "amount in controversy" was implicitly taken into account by the relevant congressional committees in determining, in 1958, the extent to which the jurisdictional amount should be raised. It is quite possible, if not probable, that Congress chose the increase to $10,000 rather than the proposed increases to $7,500 or $15,000 on the basis of workload estimates which clearly relied on the settled doctrine that separate and distinct claims could not be aggregated. Where Congress has consistently re-enacted its prior statutory language for more than a century and a half in the face of a settled interpretation of that language, it is perhaps not entirely realistic to designate the resulting rule a "judge-made formula."

To overrule the aggregation doctrine at this late date would run counter to the congressional purpose in steadily increasing through the years the jurisdictional amount requirement. That purpose was to check, to some degree, the rising caseload of the federal courts, especially with regard to the federal courts' diversity of citizenship jurisdiction. Any change in the doctrine of aggregation in class action cases under Rule 23 would inescapably have to be applied as well to the liberal joinder provisions of Rule 20 and to the joinder of claims provisions of Rule 18. The result would be to allow aggregation of practically any claims of any parties that for any reason happen to be brought together in a single action. This would seriously undercut the purpose of the jurisdictional amount requirement. The expansion of the federal caseload could be most noticeable in class actions brought on the basis of diversity of citizenship. Under current doctrine, if one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own State. See *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U. S. 356 (1921). To allow aggregation of claims where only one member of the entire class is of diverse citizenship could transfer into the federal courts numerous local controversies involving exclusively questions of state law. In *Healy* v. *Ratta,* 292 U. S. 263 (1934), this Court noted that by successively raising the jurisdictional amount, Congress had determined that cases involving lesser amounts should be left to be dealt with by the state courts and said:

> "The policy of the statute calls for its strict construction. . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." 292 U. S. 263, 270.

Finally, it has been argued that unless the established aggregation principles are overturned, the functional advantages alleged to inhere in the new class action Rule will be undercut by resort to the old forms. But the disadvantageous results are overemphasized, we think, since lower courts have developed largely workable standards for determining when claims are joint and common, and therefore entitled to be aggregated, and when they are separate and distinct and therefore not aggregable. Moreover, while the class action device serves a useful function across the entire range of legal questions, the jurisdictional amount requirement applies almost exclusively to controversies based upon diversity of citizenship. A large part of those matters involving federal questions can be brought, by way of class actions or otherwise, without regard to the amount in controversy. Suits involving issues of state law and brought on the basis of diversity of citizenship can often be most appropriately tried in state courts. The underlying claims in the two cases before us, for example, will be determined exclusively on the basis of Missouri and Kansas law, respectively. In No. 109, a separate suit litigating the underlying issues has already been filed in a Missouri state court. In No. 117, the residents of Kansas who contend that certain gas service charges are not authorized by Kansas law can bring a class action under Kansas procedures that are patterned on former Federal Rule 23. There is no compelling reason for this Court to overturn a settled interpretation of an important congressional statute in order to add to the burdens of an already overloaded federal court system. Nor can we overlook the fact that the Congress that permitted the Federal Rules to go into effect was assured before doing so that none of the Rules would either expand or contract the jurisdiction of federal courts. If there is a present need to expand the jurisdiction of those courts we cannot overlook the fact that the Constitution specifically vests that power in the Congress, not in the courts.

The judgment in No. 109 is

Affirmed.

The judgment in No. 117 is

Reversed.

MR. JUSTICE FORTAS, with whom MR. JUSTICE DOUGLAS joins, dissenting.

The Court today refuses to conform the judge-made formula for computing the amount in controversy in class actions with the 1966 amendment to Rule 23 of the Federal Rules of Civil Procedure. The effect of this refusal is substantially to undermine a generally welcomed and long-needed reform in federal procedure.[1]

Its impact will be noticeable not only in diversity of citizenship cases but also in important classes of federal question cases in which federal jurisdiction must be based on 28 U. S. C. § 1331, the general federal question provision, rather than on one of the specific grants of federal jurisdiction.[2]

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[1] On the background of the amendment to Rule 23 and its reception, see, *e. g.*, Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 380–386 (1967); Cohn, The New Federal Rules of Civil Procedure, 54 Geo. L. J. 1204, 1213–1214 (1966); Note, Proposed Rule 23: Class Actions Reclassified, 51 Va. L. Rev. 629, 630–636 (1965). See also 2 W. Barron & A. Holtzoff, Federal Practice and Procedure § 561 and n. 15.1 (C. Wright ed. 1968 Pocket Part) (hereinafter cited as Barron & Holtzoff). Even commentators critical of the apparent breadth of the new Rule welcomed abolition of the categories of the old Rule. *E. g.*, Ford, The History and Development of Old Rule 23 and the Development of Amended Rule 23, 32 ABA Antitrust L. J. 254, 257–258 (1966).

[2] The majority says broadly, "A large part of those matters involving federal questions can be brought, by way of class actions

The artificial, awkward, and unworkable distinctions between "joint," "common," and "several" claims and between "true," "hybrid," and "spurious" class actions which the amendment of Rule 23 sought to terminate is now re-established in federal procedural law. Litigants, lawyers, and federal courts must now continue to be ensnared in their complexities in all cases where one or more of the coplaintiffs have a claim of less than the jurisdictional amount, usually $10,000.

It was precisely this morass that the 1966 amendment to Rule 23 sought to avoid. The amendment had as its purpose to give the Federal District Courts wider discretion as to the type of claims that could be joined in litigation. That amendment replaced the metaphysics of conceptual analysis of the "character of the right sought to be enforced" by a pragmatic, workable definition of when class actions might be maintained,

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or otherwise, without regard to the amount in controversy." *Ante*, at 341. However, in at least one vitally important type of federal question case—an action alleging that governmental action, state or federal, violates constitutional limits—the task of demonstrating the existence of federal jurisdiction would in many instances be significantly complicated if 28 U. S. C. § 1331 were not available. There are, to be sure, a large number of specific statutory provisions conferring on the federal courts jurisdiction to hear certain types of federal question cases. No doubt many constitutional cases could ultimately be brought within one of these special provisions. However, the pitfalls of seeking to establish federal jurisdiction in a constitutional action against public officials without resort to 28 U. S. C. § 1331 are suggested by the diversity of opinions in *Hague* v. *CIO,* 307 U. S. 496 (1939). Even if 28 U. S. C. § 1343 provides a basis for jurisdiction of such an action against state officials, see *Pierson* v. *Ray,* 386 U. S. 547 (1967); *Monroe* v. *Pape,* 365 U. S. 167 (1961), that statute is no help to one challenging purely federal action. *Wheeldin* v. *Wheeler,* 373 U. S. 647, 650 and n. 2 (1963). See generally Friedenthal, New Limitations on Federal Jurisdiction, 11 Stan. L. Rev. 213, 216–218 (1959).

that is, when claims of various claimants might be aggregated in a class action, and it carefully provided procedures and safeguards to avoid unfairness.[3]

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[3] The Rule, as amended, reads:

"Rule 23. Class Actions

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

"(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

"(1) the prosecution of separate actions by or against individual members of the class would create a risk of

"(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

"(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

"(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

"(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

"(c) Determination by Order Whether Class Action to be Main-

The amendment was formulated with care by an able committee and recommended to this Court by the Judicial Conference of the United States pursuant to 28

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tained; Notice; Judgment; Actions Conducted Partially as Class Actions.

"(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

"(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

"(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

"(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

"(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify

U. S. C. § 331.[4] It was accepted and promulgated by this Court,[5] and, with congressional acquiescence, became the law of the land on July 1, 1966. 28 U. S. C. § 2072 (1964 ed., Supp. III). Now the Court, for reasons which in my opinion will not stand analysis, defeats the purpose of the amendment as applied to cases like those before us here and insists upon a perpetuation of distinctions which the profession had hoped would become only curiosities of the past.

The Court is led to this unfortunate result by its insistence upon regarding the method of computing the amount in controversy as embodied in an Act of Congress, as unaffected by the subsequent amendment of Rule 23, and as immune from judicial re-examination because any change would be an impermissible expansion of the jurisdiction of the courts. None of these premises is correct.

I.

Since the first Judiciary Act, Congress has included in certain grants of jurisdiction to the federal courts—notably the grants of jurisdiction based on diversity of

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whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

"(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. (As amended Feb. 28, 1966, eff. July 1, 1966.)"

[4] 1965 U. S. Judicial Conf. Proceedings Rep. 52–53. See Kaplan, *supra*, n. 1, at 357–358.

[5] 383 U. S. 1031 (1966).

citizenship[6] and the later-established grant of a general jurisdiction to consider cases raising federal questions[7]—a requirement that the "matter in controversy" exceed a stated amount of money. Congress has never expanded or explained the bare words of these successive jurisdictional amount statutes. Over the years the courts themselves have developed a detailed and complex set of rules for determining when the jurisdictional amount requirements are met.[8]

Among these rules is the proposition that multiple parties cannot aggregate their "separate and distinct" claims to reach the jurisdictional amount. *E. g., Troy Bank* v. *Whitehead & Co.*, 222 U. S. 39, 40 (1911); *Oliver* v. *Alexander*, 6 Pet. 143, 147 (1832). Applying that general principle to traditional property law concepts, the courts developed the more specialized rule that multiple parties who asserted very similar legal claims could not aggregate them to make up the jurisdictional amount if their interests, however similar in fact, were in legal theory "several," *e. g., Pinel* v. *Pinel*, 240 U. S. 594 (1916), but that such aggregation was permissible where the parties claimed undivided interests in a single "joint" right. *E. g., Texas & Pacific R. Co.* v. *Gentry*, 163 U. S. 353 (1896); *Shields* v. *Thomas*, 17 How. 3 (1855).

This general aggregation rule, and its much later application to class actions,[9] rest entirely on judicial decisions, not on any Act of Congress. There is certainly no reason the specific application of this body of federal decisional law to class actions should be immune from re-evaluation after a fundamental change in the structure of federal class actions has made its continuing application wholly anomalous.[10]

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[6] 28 U. S. C. § 1332.

[7] 28 U. S. C. § 1331. Other jurisdictional statutes providing a monetary requirement include 28 U. S. C. § 1335 (interpleader); § 1346 (claims against United States); § 1445 (removal of certain actions against carriers).

[8] See generally 1 J. Moore, Federal Practice ¶¶ 0.90–0.99; 1 Barron & Holtzoff § 24; Ilsen & Sardell, The Monetary Minimum in Federal Court Jurisdiction: I, 29 St. John's L. Rev. 1 (1954), *id.*, II, p. 183 (1955); Note, Federal Jurisdictional Amount: Determination of the Matter in Controversy, 73 Harv. L. Rev. 1369 (1960).

[9] *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583 (1939); *Buck* v. *Gallagher*, 307 U. S. 95 (1939). See *Thomson* v. *Gaskill*, 315 U. S. 442 (1942).

The majority rather half-heartedly suggests that this judicial interpretation of the jurisdictional amount statute is not subject to judicial re-evaluation because Congress by re-enacting the jurisdictional amount statute from time to time has somehow expressed an intent to freeze once and for all the judicial interpretation of the statute. As the majority frankly acknowledges, there are "hazards and pitfalls involved in assuming that re-enactment of certain language by Congress always freezes the existing judicial interpretation of the statutes involved."

While re-enactment may sometimes signify adoption, in my view the appropriate position on the matter is that stated in *Girouard* v. *United States*, 328 U. S. 61, 69–70 (1946):

> " 'It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines.' It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law. . . . The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of those cases." [11]

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[10] For a criticism of the aggregation doctrine in another context, see Note, The Federal Jurisdictional Amount Requirement and Joinder of Parties Under the Federal Rules of Civil Procedure, 27 Ind. L. J. 199 (1952).

[11] See also *Helvering* v. *Reynolds*, 313 U. S. 428, 432 (1941); Note, Legislative Adoption of Prior Judicial Construction: The

This case, far from being one in which there are "very persuasive circumstances" indicating congressional adoption of prior judicial doctrines, is one where only by the most obvious fiction can congressional re-enactment of a general statute be said to manifest an intention to adopt and perpetuate an existing technical judicial doctrine designed to facilitate administration of the statute.

The hearings and reports on the 1958 statute raising the jurisdictional amount from $3,000 to $10,000—which the majority fastens on as the adopting re-enactment—include not one word about the whole complex body of rules by which courts determine when the amount is at issue, much less any reference to the particular problem of aggregation of claims in class action cases.[12] The

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Girouard Case and the Reenactment Rule, 59 Harv. L. Rev. 1277 (1946). In *Francis* v. *Southern Pacific Co.*, 333 U. S. 445, 450 (1948), the majority noted the difficulty of regarding re-enactment as a congressional adoption of existing judicial doctrines, but decided that "in the setting of this case" adoption was implied. The dissent responded:

"[I]f judges make rules of law, it would seem that they should keep their minds open in order to exercise a continuing and helpful supervision over the manner in which their laws serve the public." 333 U. S., at 453.

"I venture the suggestion that it would be shocking to members of Congress, even those who are in closest touch with [the kind of legislation involved], to be told that their 'silence' is responsible for application today of a rule which is out of step with the trend of all congressional legislation for more than the past quarter of a century. There are some fields in which congressional committees have such close liaison with agencies in regard to some matters, that it is reasonable to assume an awareness of Congress with relevant judicial and administrative decisions. But I can find no ground for an assumption that Congress has known about the . . . rule [held adopted by re-enactment] and deliberately left it alone because it favored such an archaic doctrine." *Id.*, 465–466.

[12] See Hearing on H. R. 2516 and H. R. 4497, before Subcommittee No. 3 of the House Committee on the Judiciary, 85th Cong., 1st

majority speculates that it is "possible, if not probable," that Congress "implicitly" took into account the existing aggregation doctrines as applied to class action cases when it decided to raise the jurisdictional amount to $10,000 rather than some higher or lower amount. If we are to attribute to Congress any thoughts on this highly technical and specialized matter, it seems to me far more reasonable to assume that Congress was aware that the courts had been developing the interpretation of the jurisdictional amount requirement in class actions and would continue to do so after the 1958 amendments.

I cannot find any meaningful sense in which the aggregation doctrines in class action cases should be any less subject to re-evaluation in the light of new conditions because Congress in 1958 re-enacted the jurisdictional amount statute to raise the dollar amount required.

II.

Whatever the pre-1966 status of the aggregation doctrines in class action cases, the amendment of the Rules in that year permits and even requires a re-examination of the application of the doctrines to such cases. The fundamental change in the law of class actions effected by the new Rule 23 requires that prior subsidiary judicial doctrines developed for application to the old Rule be harmonized with the new procedural law. By Act of Congress, the Rules of Procedure, when promulgated according to the statutorily defined process, have the effect of law and supersede all prior laws in conflict with them. 28 U. S. C. § 2072 (1964 ed., Supp. III). Thus, even if the old aggregation doctrines were embodied in statute—as they are not—they could not stand if they conflicted with the new Rule.

Sess., ser. 5 (1957); H. R. Rep. No. 1706, 85th Cong., 2d Sess. (1958); S. Rep. No. 1830, 85th Cong., 2d Sess. (1958).

Under the pre-1966 version of Rule 23 the very availability of the class action device depended on the "joint" or "common" "character of the right sought to be enforced."[13] If the right were merely "several," only a "spurious" class action could be maintained and only those members of the class who actually appeared as parties were bound by the judgment.[14] It was in this context of a law of class actions already heavily dependent on categorization of interests as "joint" or "several" that the traditional aggregation doctrines were originally applied to class actions under the Federal Rules. In such a context those aggregation doctrines which the majority now perpetuates in the quite different context of the new Rule, whatever their other defects, were at least not anomalous and eccentric.

Scholarly and professional criticism of the "character of interest" classification scheme was vigorous and distinguished.[15] Courts as well found the old Rule 23 categories confusing and unhelpful in making practical decisions. Not only was the categorization difficult,[16] but dividing group interests according to whether they were "joint" or "several" did not isolate those cases in which a class action was appropriate from those in which it was not.[17] In proposing amendment of Rule 23, the Advisory Committee summed up experience under the old Rule by saying:

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[13] A "true" class action could also be maintained to enforce a right "secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it." Stockholders' derivative actions were the most significant type of suit within this group. They are now separately dealt with under Rule 23.1 in addition. Under the former Rule 23 (a)(2), if the right was "several" in character, "and the object of the action is the adjudication of claims which do or may affect specific property involved in the action," a "hybrid" class action could be maintained which would determine the interests of each member of the class in the particular property.

[14] See, *e. g., All Amer. Airways, Inc.* v. *Elderd,* 209 F. 2d 247 (C. A. 2d Cir. 1954). Thus, under the prior Rule, the "spurious" class action was in effect little more than a permissive joinder device. The pre-amendment categorization and its consequences are explicated in detail in 3A J. Moore, Federal Practice ¶¶ 23.08–23.14.

[15] *E. g.,* Z. Chafee, Some Problems of Equity 243–295 (1950); C. Wright, Handbook of the Law of Federal Courts 269 (1963); Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684 (1941). See Note, Proposed Rule 23: Class Actions Reclassified, 51 Va. L. Rev. 629, n. 3 (1965).

> "In practice the terms 'joint,' 'common,' etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain." 39 F. R. D. 98.

In response to the demonstrated inappropriateness of the "character of interest" categorization, the Rule dealing with class actions was fundamentally amended, effective in July 1966. Under the new Rule the focus shifts from the abstract character of the right asserted to explicit analysis of the suitability of the particular claim to resolution in a class action. The decision that a class action is appropriate is not to be taken lightly; the district court must consider the full range of relevant factors specified in the Rule. However, whether a claim is, in traditional terms, "joint" or "several" no longer has any necessary relevance to whether a class action is proper. Thus, the amended Rule 23, which in the area of its operation has the effect of a statute, states a new method for determining when the common interests of many individuals can be asserted and resolved in a single litigation.

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[16] A notable example is *Deckert* v. *Independence Shares Corp.*, 27 F. Supp. 763 (D. C. E. D. Pa.), rev'd, 108 F. 2d 51 (C. A. 3d Cir. 1939), rev'd, 311 U. S. 282 (1940), on remand, 39 F. Supp. 592 (D. C. E. D. Pa.), rev'd *sub nom. Pennsylvania Co. for Insurances on Lives* v. *Deckert,* 123 F. 2d 979 (C. A. 3d Cir. 1941). The views of successive courts on the proper classification of the *Deckert* action are discussed in Chafee, *supra,* n. 15, at 263–269.

[17] See Fed. Rule Civ. Proc. 23, Advisory Comm. Note, 39 F. R. D. 98–99.

The jurisdictional amount statutes require placing a value on the "matter in controversy" in a civil action. Once it is decided under the new Rule that an action may be maintained as a class action, it is the claim of the whole class and not the individual economic stakes of the separate members of the class which is the "matter in controversy." That this is so is perhaps most clearly indicated by the fact that the judgment in a class action, properly maintained as such, includes all members of the class. Rule 23 (c)(3). This effect of the new Rule in broadening the scope of the "controversy" in a class action to include the combined interests of all the members of the class is illustrated by the facts of No. 117. That class action, if allowed to proceed, would, under the Rule, determine not merely whether the gas company wrongfully collected $7.81 for taxes from Mr. Coburn. It would also result in a judgment which, subject to the limits of due process,[18] would determine—authoritatively and not merely as a matter of precedent—the status of the taxes collected from the 18,000 other people allegedly in the class Coburn seeks to represent.[19] That being the case, it is hard to understand why the fact that the alleged claims are, in terms of the old Rule categories, "several" rather than "joint," means that the "matter in controversy" for jurisdictional amount purposes must be regarded as the $7.81 Mr. Coburn claims instead of the thousands of dollars of alleged overcharges of the whole class, the status of all of which would be determined by the judgment.

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[18] See *Hansberry* v. *Lee,* 311 U. S. 32, 42–43 (1940).

[19] If members of the class elected to exercise the right, which might be extended them under Rule 23 (b)(3), to exclude themselves from the litigation, they would not be included in the judgment in the class action.

In past development of rules concerning the jurisdictional amount requirement, the courts have, properly, responded to changes in the procedural and substantive law.[20] Now, confronted by an issue of the meaning of the jurisdictional amount requirement arising in the context of a new procedural law of class actions, we should continue to take account of such changes. We should not allow the judicial interpretation of the jurisdictional amount requirement to become petrified into forms which are products of, and appropriate to, another time. To do this would vitiate a significant part of the reform intended to be accomplished by the amendment of Rule 23. For the majority result will continue to make determinative of the maintainability of a class action just that obsolete conceptualism the amended Rule sought to make irrelevant. In this sense, continued adherence to the old aggregation doctrines conflicts with the new Rule and is improper under 28 U. S. C. § 2072 (1964 ed., Supp. III).

III.

Permitting aggregation in class action cases does not involve any violation of the principle, expressed in Rule 82 and inherent in the whole procedure for the promulgation and amendment of the Federal Rules, that the courts cannot by rule expand their own jurisdictions. While the Rules cannot change subject-matter jurisdiction, changes in the forms and practices of the federal courts through changes in the Rules frequently and necessarily will affect the occasions on which subject-matter jurisdiction is exercised, because they will in some cases make a difference in what cases the federal courts will hear and who will be authoritatively bound by the judgment.[21] For example, the development of the law of joinder and ancillary jurisdiction under the Federal Rules has influenced the "jurisdiction" of the federal courts in this broader sense.[22] Indeed, the promulgation of the old Rule 23 provided a new means for resolving in a single federal litigation, based on diversity jurisdiction, the claims of all members of a class, even though some in the class were not of diverse citizenship from parties on the other side.[23] Similarly, the creation in a Rule having statutory effect of a new type of class action—one meeting the requirements of the new Rule as to suitability for class-wide resolution, although involving "several" interests of the members of the class—has changed the procedural context in which the subject-matter-jurisdiction statutes, like those referring to jurisdictional amount, are to be applied. Making judicial rules for calculating jurisdictional amount responsive to the new structure of class actions is not an extension of the jurisdiction of the federal courts, but a recognition that the procedural framework in which the courts operate has been changed by a provision having the effect of law.

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[20] For example, the general rule is that if suit is brought only for past installments due under an installment contract, the jurisdictional amount is in controversy only if the installments due at the time of suit exceed the jurisdictional amount. *E. g., New York Life Ins. Co.* v. *Viglas,* 297 U. S. 672 (1936). However, if, because of the structure of equitable remedies or the availability of a declaratory judgment, the action can put in issue the validity of the contract as a whole, the "matter in controversy" is not the accrued damages, but the potential value of full performance. *Landers Frary & Clark* v. *Vischer Prods. Co.,* 201 F. 2d 319 (C. A. 7th Cir. 1953); *Franklin Life Ins. Co.* v. *Johnson,* 157 F. 2d 653 (C. A. 10th Cir. 1946); *Davis* v. *American Foundry Equip. Co.,* 94 F. 2d 441 (C. A. 7th Cir. 1938). See Note, Developments in the Law, Declaratory Judgments—1941-1949, 62 Harv. L. Rev. 787, 801-802 (1949).

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[21] See *Mississippi Pub. Corp.* v. *Murphree,* 326 U. S. 438, 445–446 (1946); Kaplan, *supra,* n. 1, at 399–400. Cf. *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U. S. 102, 116–125 (1968).

[22] See Wright, *supra,* n. 15, at 19–20; Fraser, Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts, 33 F. R. D. 27, 28.

[23] It has long been established that if the requisite diversity existed between the original parties federal jurisdiction is not ousted merely because later intervenors or members of the class represented by the original parties are citizens of the same State as an adverse party. *Stewart* v. *Dunham,* 115 U. S. 61 (1885); *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U. S. 356 (1921). The original Rule 23 provided new occasions for the assertion of this principle, with respect to both "true" class actions, *Montgomery Ward & Co.* v. *Langer,* 168 F. 2d 182 (C. A. 8th Cir. 1948), and those merely "spurious," *Amen* v. *Black,* 234 F. 2d 12 (C. A. 10th Cir. 1956), dismissed as moot, 355 U. S. 600 (1958).

In a larger sense as well, abandonment of the old aggregation rules for class actions would fulfill rather than contradict the command that courts adhere to the jurisdictional boundaries established by Congress. In a large number of instances, Congress has said that cases raising claims with a certain subject matter may be heard in federal courts regardless of the amount involved. However, it has also provided generally that in the two great areas of Article III jurisdiction—federal questions and diversity of citizenship—any suit, regardless of specific subject matter, may be heard if "the matter in controversy exceeds the sum or value of $10,000." Just as it would be wrong for the courts to exercise a jurisdiction not properly theirs, so it would be wrong for the courts to refuse to exercise a part of the jurisdiction granted them because of a view that Congress erred in granting it.

The new Rule 23, by redefining the law of class actions, has, with the effect of statute, provided for a decision by the district courts that the nominally separate and legally "several" claims of individuals may be so much alike that they can be tried all at once, as if there were just one claim, in a single proceeding in which most members of the class asserting the claim will not be personally present at all. When that determination has been made, in accordance with the painstaking demands of Rule 23, there is authorized to be brought in the federal courts a single litigation, in which, both practically and in legal theory, the thing at stake, the "matter in controversy," is the total, combined, aggregated claim of the whole class. When that happens the courts do not obey, but violate, the jurisdictional statutes if they continue to impose ancient and artificial judicial doctrines to fragment what is in every other respect a single claim, which the courts are commanded to stand ready to hear.

For these reasons, I would measure the value of the "matter in controversy" in a class action found otherwise proper under the amended Rule 23 by the monetary value of the claim of the whole class.

HADNOTT ET AL. v. AMOS, SECRETARY OF STATE OF ALABAMA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA.

No. 647. Argued January 21, 1969.—Decided March 25, 1969.

Appellants, the National Democratic Party of Alabama (NDPA) and some of its officers and candidates (mostly Negroes) in the November 1968 general election, brought suit against respondents, state officials, seeking to enjoin enforcement of certain Alabama election laws which appellants claimed were unconstitutional on their face and had been discriminatorily used by appellees to keep various NDPA candidates from being on the ballot in that election. These laws included (1) Ala. Code, Tit. 17, § 274 (1958), which required a candidate within five days after the announcement of his candidacy to file a statement designating his finance committee and (2) the "Garrett Act" of 1967, which required independent candidates, who prior to that law could file declarations of intent after nomination by mass meeting in May, to do so by March 1, when primary candidates had to file. A three-judge District Court entered a temporary restraining order enjoining the appropriate Alabama officials from using ballots at the 1968 general election which did not include the names of the NDPA candidates. Appellees' answer challenged the qualifications of those candidates for failure to comply with the Alabama laws. After a hearing the District Court dissolved the temporary injunction and upheld the Alabama statutes on their face and as applied. This Court on appellants' application and after oral argument ordered the District Court's temporary restraining order continued pending action on the jurisdictional statement. The NDPA candidates were elected to various offices in Etowah, Marengo, and Sumter Counties and apparently would have been elected in Greene County had their names appeared on the ballot. There Probate Judge Herndon, who was responsible for preparing the ballot, omitted the names of the NDPA candidates on the ground that they had not filed a second § 274 designation after the Democratic primary of May 7, 1968, in which they had been candidates (although the successful white candidates filed no second designation after that date), and that "to the best of [his] knowledge and belief" the NDPA had held no mass meeting to choose candidates for the general election on that date as they claimed to have done (in accordance with an Alabama law that local candidates not selected in primaries be nominated by mass meeting the first Tuesday in May of the election year). Herndon later admitted knowing that the NDPA candidates had made the § 274 designation in February 1968 before they entered the primary and that the NDPA mass meeting might have been held without his having known about it. After the election appellants filed in this Court a motion to show cause why Judge Herndon should not be held in contempt and why the Greene County election should not be set aside and a new election held. The District Court (in response to a motion by the United States) issued a rule to show cause why the Greene County election should not be enjoined, and the court stayed giving effect to that election. *Held:*

1. The disqualification in the 1968 election of the NDPA candidates on the ground that they failed to meet requirements under the Alabama Corrupt Practices Act which their opponents did not have to meet constituted, on the record here, an unequal application of the law in violation of the Equal Protection Clause of the Fourteenth Amendment. Pp. 361–364.

2. Disqualification of the NDPA candidates for failure to comply with the Garrett Act was unlawful since that Act, which imposed increased barriers on independent candidates, was inoperative because the Alabama officials had failed to meet the approval requirements of § 5 of the Voting Rights Act of 1965. *Whitley* v. *Williams,* 393 U. S. 544. Pp. 365–366.

3. The case is remanded to the District Court with directions (1) to order the prevailing NDPA candidates in Etowah, Marengo, and Sumter Counties to be treated as elected and (2) to require the officials to hold a new election in Greene County for the offices contested by NDPA candidates, whose names shall appear on the ballots. P. 367.

295 F. Supp. 1003, reversed and remanded. [Note: For Court's action on motion to show cause why Judge Herndon should not be held in contempt, see *post,* p. 399.]

Charles Morgan, Jr., argued the cause for appellants. With him on the brief were *Reber F. Boult, Jr., Orzell Billingsley, Jr., Robert P. Schwenn, Melvin L. Wulf,* and *Eleanor Holmes Norton.*

L. Drew Redden, Special Assistant Attorney General of Alabama, argued the cause for appellees Amos et al.

With him on the brief were *MacDonald Gallion,* Attorney General, *pro se, John G. Bookout,* Deputy Attorney General, and *Gordon Madison* and *Leslie Hall,* Assistant Attorneys General.

Louis F. Claiborne argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Pollak, Nathan Lewin,* and *Frank M. Dunbaugh.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This suit is a class action brought by the National Democratic Party of Alabama (NDPA) and some of its officers and candidates in the 1968 general election against Alabama state officials who had refused to include various NDPA candidates on the ballot for various county and state-wide offices. As the complaint sought an injunction against enforcement of Alabama statutes on federal constitutional grounds, a three-judge federal court was impaneled. 28 U. S. C. § 2281.

The District Court entered a temporary restraining order. Thereafter appellees filed their answer challenging, *inter alia,* the qualifications of NDPA candidates because of their failure to satisfy certain specified requirements of Alabama law. On October 11, 1968, after a hearing on the merits, the three-judge court, by a divided vote, dissolved the temporary injunction and upheld on their face and as applied all the challenged Alabama statutes.

Appellants appealed to this Court (28 U. S. C. § 1253) and on October 14 we restored the District Court's temporary restraining order, saying: "The application for restoration of temporary relief is granted pending oral argument on the application, which is set for Friday, October 18, 1968, at 9:00 a. m. The case is placed on the summary calendar."

And on October 19, 1968, we entered an additional order providing in part:

> "The order entered October 14, 1968, restoring temporary relief is continued pending action upon the jurisdictional statement which has been filed."

NDPA candidates, mostly Negroes, were elected to various local offices in Etowah, Marengo, and Sumter Counties. But in Greene County the NDPA candidates for local office were left off the ballot except for absentee voters. In Greene County the only candidates appearing on the ballot were the regular Democratic Party nominees for local offices and they received between 1,699 and 1,709 votes each. It appears that NDPA candidates in Greene County would have won had they been on the ballot[1] for 1,938 ballots were marked for the NDPA "straight ticket."

On November 15 appellants filed in this Court a motion to show cause why James D. Herndon, Probate Judge, Greene County,[2] should not be held in contempt and why the election in Greene County should not be set aside and a new one held. Later the United States moved in the District Court for relief and that court issued a rule to show cause why the results of the November election in Greene County should not be enjoined. The District Court stayed giving effect to the Greene County election.

We have heard argument on the jurisdictional statement and on the motion to hold Judge Herndon in contempt. On the merits of the appeal, we reverse.

First. The Alabama Corrupt Practices Act requires each candidate within five days "after the announcement of his candidacy for any office" to file a statement showing "the name of not less than one nor more than five persons" chosen to receive, expend, audit, and disburse funds for his election. Ala. Code, Tit. 17, § 274 (1958).

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[1] NDPA ran mostly Negro candidates—60 out of 67. In Greene County, Negroes of voting age are in a numerical majority—5,001 Negro, 1,649 white, according to the 1960 census.

[2] Under Alabama law the probate judges have responsibility for preparing ballots to be used in each of the State's counties.

The disqualification of the NDPA candidates for their alleged failure to satisfy this provision of the Alabama Act implicates Probate Judge Herndon, who was responsible for the preparation of the Greene County ballot which omitted their names.

In this case the black candidates for Greene County offices designated finance committees in February 1968 prior to their entry in the Democratic primary. Appellees contend that it was sufficient to justify Judge Herndon's omission of the names that the NDPA candidates did not file a second designation of financial committee after May 7, the date of the primary, and the date on which those candidates were nominated by the NDPA. Appellants contend that disqualification for that reason constituted discriminatory enforcement of the Corrupt Practices Act in violation of the Equal Protection Clause. Since the names of the white candidates who won the May 7 primary were placed on the ballot, although they also did not file a second designation after that date, appellees clearly have the burden of justifying the denial of ballot places to the black NDPA candidates. Appellees have failed to satisfy that burden.[3]

Alabama law requires all candidates for local office, not selected in primaries, to be nominated by mass meeting on the first Tuesday in May of the election year. Ala. Code, Tit. 17, §§ 413, 414 (1958). The certificate of nomination sent to Judge Herndon, probate judge for

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[3] After first notifying the NDPA of its failure to file a certified list of its candidates with her office, the Secretary of State then notified the party of her willingness to accept such nominations filed by September 5. According to the Secretary of State, the NDPA complied with her condition by filing on time.

Greene County, on September 4, stated that NDPA nominees had been selected pursuant to a mass meeting.

On September 18 the District Court temporarily restrained the omission from the ballot of NDPA candidates for state and local office. That restraint was dissolved on October 11. Meanwhile counsel for the white Greene County candidates, who was the county solicitor, prompted Judge Herndon to file an affidavit in which he stated that to the "best of [his] knowledge and belief" the NDPA held no local mass meeting on May 7 at which nominations were made, and further that none of the six NDPA candidates "filed or offered to file in [his] office" the designation of financial committee required by the Corrupt Practices Act. Yet when his deposition was taken on December 27, the judge conceded that the mass meeting might have been held without his hearing about it and admitted knowledge that the black candidates had filed designations of financial committee in February. He did not say why in these circumstances the February filing did not suffice for the general election; the designations refer to candidacies for the general election as well as the primary election.[4] Nor did he offer any explanation why if the February filings by the white candidates sufficed for the general election, the filings of the black candidates should be treated differently. The record is therefore utterly devoid of any explanation adequate to satisfy appellees' burden. It is true that at oral argument in this Court counsel for appellees suggested that the Alabama courts might construe the statutory words—"[w]ithin five days after the announcement of his candidacy . . . each candidate for a county office . . . shall file [the designation statement] with the judge of probate"—to require a second filing by losers in a primary who stand at the general election as candidates of another party. But it was not urged, nor could it be on this record, that appellees' distinction between the black and white candidates was rested on that construction.

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[4] The form itself and the instructions on the back of the form make clear that filing of the form fulfills the requirements of the Alabama Corrupt Practices Act for "nomination or election." In the typical form filed, as printed in the dissenting opinion, the committee designated is named "for the purpose of aiding or promoting my *nomination or election.*" (Emphasis supplied.) Moreover, printed instructions on the backside to both "candidates for State offices" and "candidates for County offices" state:

"A copy of this announcement of candidacy filed with the Secretary of State and Probate Judge[s] will meet the requirements of Section 274 of Title 17, Alabama Code of 1940, as amended [Corrupt Practices Act], where the candidate himself (rather than a committee) intends to receive, disburse and report on *all monies used in promoting his nomination or election.*" (Emphasis supplied.)

We deal here with Fifteenth Amendment rights which guarantee the right of people regardless of their race, color, or previous condition of servitude to cast their votes effectively and with First Amendment rights which include the right to band together for the advancement of political beliefs. *Williams* v. *Rhodes,* 393 U. S. 23. While the regulation of corrupt practices in state and federal elections is an important governmental function, we refuse to accept a reading of an Act which gives such a loose meaning to words and such discretionary authority to election officials as to cause Fifteenth and First Amendment rights to be subject to disparate treatment. That risk is compounded here where the penalty is the irrevocable striking of candidates from the ballot without notice or an opportunity for contest and correction.

When the Alabama Act is construed as appellants' opponents were allowed to construe it without suffering disqualification, we conclude that appellants met the same requirements. Unequal application of the same law to different racial groups has an especially invidious connotation.

Second. In 1967 Alabama passed the Garrett Act (L. 1967, Act 243) barring from the ballot in a general election a candidate for a state, district, or federal office "who does not file a declaration of intention to become a candidate for such office with the secretary of state on or before the first day of March of the year in which such general election is held." The Garrett Act also requires a declaration of the political party whose nomination the candidate seeks; or if he is not a party candidate that he will run as an independent. A like provision bars probate judges from printing on ballots the names of candidates for county offices unless they have filed a declaration of intention on or before the prior March 1. Accordingly, appellees justify their disqualification of NDPA candidates in Etowah, Marengo, and Sumter Counties, and Judge Herndon justifies his omission of those candidates from the Greene County ballot, on the ground that they did not comply with the Garrett Act.

Prior to the Garrett Act, every candidate desiring to run in a primary was required to file a declaration of candidacy by March 1. Ala. Code, Tit. 17, § 348 (1958). Independents were exempt from this requirement and they were able to get on the ballot after nomination by a mass meeting held on the first Tuesday in May. *Id.* §§ 413, 414. As a result of the Garrett Act, an independent candidate had to decide whether to run at the same time as candidates in the primary made their determination.

The question is whether the Garrett Act is affected by § 5 of the Voting Rights Act of 1965, 79 Stat. 439, 42 U. S. C. § 1973c (1964 ed., Supp. III), which provides that whenever States like Alabama seek to administer "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," the

State may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that "such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." It is further provided in § 5 that unless and until the District of Columbia court enters such judgment "no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure." [5]

The Garrett Act is in respects material here on all fours with *Whitley* v. *Williams,* 393 U. S. 544, in which we held that a like provision added to the Mississippi Code could not be applied until it had been approved in one of the two ways provided in § 5 of the Voting Rights Act of 1965.

In the *Whitley* case we dealt with a new Mississippi law which, *inter alia,* changed the time for filing a petition as an independent candidate from 40 days before the *general* election to 60 days before the *primary* election.

We held that this new provision was subject to § 5 of the Voting Rights Act of 1965 as it was aimed "at increasing the difficulty for an independent candidate to gain a position on the general election ballot." *Id.,* at 570. And we added that that change "might also undermine the effectiveness of voters who wish to elect independent candidates." *Ibid.* The increased barriers placed on independent candidates by Alabama's Garrett Act likewise bring it within the purview of § 5 of the Federal Act. The Alabama officials, therefore, acted unlawfully in disqualifying independent candidates in the 1968 election for failure to comply with the Garrett Act.

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[5] Section 5 contains an alternative procedure of submitting the changed provisions to the Attorney General, in which case they become enforceable upon failure of the Attorney General to object.

On the merits, we reverse the District Court and remand the cause with directions (1) to issue an appropriate order requiring the prevailing NDPA candidates in Etowah, Marengo, and Sumter Counties to be treated as duly elected to the offices for which they ran; and (2) to require the state and local officials promptly to conduct a new election in Greene County for the various county offices contested by NDPA candidates,[6] at which election the NDPA candidates for those respective positions shall appear on the ballot.

The motion to hold Judge Herndon in contempt will be disposed of in a separate opinion.

It is so ordered.

MR. JUSTICE BLACK took no part in the consideration or decision of this case.

MR. JUSTICE WHITE, with whom MR. JUSTICE STEWART joins, dissenting in part.

As I understand the arguments in this case, appellees suggest that whatever reasons state officials may have given for excluding appellants from the ballot, the exclusion and the judgment below are sustainable on independent grounds, at least as to the Greene County NDPA candidates. The Corrupt Practices Act, it is said, required the filing of committee designations not only when appellants became Democratic Party candidates* and entered the primary but when, after losing

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[6] These are the offices of County Commissioner for Districts 1, 2, 3, and 4, and Places 1 and 2 on the County Board of Education.

*At that time they filed designations which were, as the Solicitor General concedes, "in terms directed to the Democratic Primary, rather than the general election." A typical designation read in the relevant part as follows:

"I hereby declare myself to be *a candidate for the Democratic nomination* (or election) *in the Primary Elections* to be held on the primary, they announced their candidacy under the banner of another party. If the Alabama courts so construed the statute, I would not think the Court would reverse this case unless it held the Corrupt Practices Act unconstitutional. Of course, the Alabama courts have not passed on this question to date. But the issue is not frivolous and I would not construe the statute here in the first instance, which the Court in effect does, but would remand the matter to the three-judge court for its interpretation of Alabama law. On the other issues in the case, I agree with the Court.

Tuesday, the 7th day of May, 1968, and on Tuesday, the 4th day of June, 1968, for the office of County Commissioner for

Greene	#1
(District, Circuit or *County*, if applicable)	(Place Number, if applicable)

. . . . .

"If I am *a candidate for the Democratic nomination* for Judge of a Court of Record, I do further certify that at the time of filing this Declaration of Candidacy I am not under disbarment or suspension.

"I hereby certify and declare that I appoint myself (and hereby accept the appointment) as the sole and only person or committee to receive, expend, audit and disburse all monies contributed, donated, subscribed, or in any way furnished or raised for the purpose of aiding or promoting my nomination or election as *such* candidate for said office in accordance with Sections 274 and 275 of Title 17 of the Code of Alabama of 1950, as amended (Corrupt Practices Act). [Emphasis added.]

"Vassie Knott

"(Signature of Candidate)."

BROTHERHOOD OF RAILROAD TRAINMEN ET AL. *v.* JACKSONVILLE TERMINAL CO.

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT.

No. 69. Argued December 11, 1968.—Decided March 25, 1969.

Florida East Coast Railway Co. (FEC), having exhausted all the Railway Labor Act's procedures for resolving a "major dispute," unilaterally changed its operating employees' rates of pay, rules, and working conditions, and petitioner unions called a strike and picketed peacefully at locations where FEC operated, including the premises of respondent terminal company. A federal district court enjoined picketing of respondent's premises except at a "reserved gate" set aside for FEC employees. The Court of Appeals reversed, holding that the Norris-LaGuardia Act barred issuance of a federal injunction, and that decision was affirmed by an equal division of this Court (385 U. S. 20). While that litigation was pending, respondent obtained from the Florida courts an injunction almost identical to the earlier federal order. The state trial court found that resumption of general picketing would result in virtual cessation of respondent's activities and cause serious economic damage to the State, and that it constituted an illegal secondary boycott and was unlawful under other state laws. *Held:*

1. The jurisdiction of the state courts was not pre-empted by the primary jurisdiction of the National Labor Relations Board, even though a small percentage of petitioner unions' membership may be subject to the National Labor Relations Act (NLRA), as this is simply a railway labor dispute to which the NLRA has no direct application. Pp. 375–377.

2. The Railway Labor Act (RLA) supplies a detailed framework to facilitate the voluntary settlement of major disputes, and while it does not specify what occurs when these procedures have been exhausted without success, it does imply the ultimate right of the parties to resort to peaceful self-help. Pp. 377–380.

3. Although the Florida courts may have jurisdiction over this litigation, the application of state law is limited by paramount federal policies of nationwide import, as the RLA's scheme for the resolution of major disputes would become meaningless if the

States could prohibit the parties from engaging in *any* self-help. Pp. 380–382.

4. The NLRA cannot be imported completely into the railway labor area, but it can be referred to for assistance in construing the RLA, and here the NLRA's policies can aid in determining whether petitioners' conduct is within the penumbra of that protected under the Act or whether it is outside the pale of permissible activity. Pp. 382–384.

5. Peaceful primary picketing incident to a lawful strike is protected conduct under the NLRA, and since there are no grounds for distinguishing picketing under the RLA, peaceful primary strikes and peaceful picketing incident thereto are within the core of protected self-help under the RLA. Pp. 384–386.

6. While it is difficult to formulate generalizations governing common situs picketing it is clear that secondary employers are not necessarily protected against picketing aimed directly at their employees, and thus to condemn all of petitioners' picketing which carries any "secondary" implications would be to paint with too broad a brush. Pp. 386–390.

7. Congress has not provided usable standards or access to administrative expertise in this area of railway labor conduct and the least unsatisfactory judicial solution is to allow those who have unsuccessfully exhausted the RLA's procedures for resolving a major dispute to employ their full range of peaceful economic power, provided it does not conflict with any other obligation imposed by federal law. Therefore, until Congress acts, primary or secondary railway labor picketing must be deemed conduct protected against state proscription. Pp. 390–393.

201 So. 2d 253, reversed.

Neal P. Rutledge argued the cause for petitioners. With him on the brief was *Lester P. Schoene*.

Dennis G. Lyons argued the cause for respondent. With him on the brief were *Paul A. Porter* and *Daniel A. Rezneck*.

J. Albert Woll, Laurence Gold, and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging reversal.

Francis M. Shea, Richard T. Conway, Ralph J. Moore, Jr., and *James A. Wilcox* filed a brief for the National Railway Labor Conference as *amicus curiae* urging affirmance.

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case arises out of the Nation's longest railroad labor dispute, much of the history of which is recorded in the pages of the United States and federal reports.[1] The events most pertinent to the present litigation began on April 24, 1966, when the Florida East Coast Railway Company (FEC), having exhausted all procedures required by the Railway Labor Act[2] for the resolution of a "major dispute,"[3] unilaterally changed its operating employees' rates of pay, rules, and working conditions. Petitioners, who represent FEC's operating employees, responded by calling a strike and thereafter by picketing the various locations at which FEC carried on its operations, including the premises of the respondent, Jacksonville Terminal Company.[4]

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[1] See *Railway Clerks* v. *Florida E. C. R. Co.,* 384 U. S. 238 (1966); *Railroad Trainmen* v. *Atlantic C. L. R. Co.,* 362 F. 2d 649, aff'd, 385 U. S. 20 (1966); *Florida E. C. R. Co.* v. *Railroad Trainmen,* 336 F. 2d 172 (1964). Cf. *Locomotive Engineers* v. *Baltimore & O. R. Co.,* 372 U. S. 284 (1963).

[2] 44 Stat. 577, as amended, 45 U. S. C. § 151 *et seq.*

[3] See *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711, 722–725 (1945); *Florida E. C. R. Co.* v. *Railroad Trainmen, supra,* at 178–179; Part III, *infra.*

[4] Petitioners are the Brotherhood of Railroad Trainmen, the Order of Railway Conductors and Brakemen, the Brotherhood of Locomotive Firemen and Enginemen, and several union officers. Petitioners contend that only the BRT and its officers were responsible for the picketing, and that the injunction was improper as to the others. Because of our disposition of the case we do not reach this question, and we treat petitioners jointly, as did the state courts.

On the complaint of respondent and two railroads other than FEC, a United States District Court issued a temporary restraining order several hours after the picketing began, and later enjoined petitioners from picketing respondent's premises except at a "reserved gate" set aside for FEC employees. The Court of Appeals for the Fifth Circuit reversed, holding that the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. § 101 *et seq.*, prevented issuance of a federal injunction. *Railroad Trainmen* v. *Atlantic C. L. R. Co.*, 362 F. 2d 649 (1966). We affirmed by an equally divided Court. 385 U. S. 20 (1966).

While that litigation was pending in the federal courts, respondent instituted the present action for injunctive relief in the Florida Circuit Court. Petitioners removed the action to the United States District Court, which promptly remanded to the state court. The Florida court issued a temporary injunction, substantially identical to the earlier federal order, which it made final after a full hearing. On appeal, the Florida District Court of Appeal affirmed *per curiam*. The Supreme Court of Florida denied certiorari and dismissed the appeal. We granted certiorari, 392 U. S. 904 (1968), to determine the extent of state power to regulate the economic combat of parties subject to the Railway Labor Act.

I.

Respondent, a Florida corporation, operates a passenger and freight rail terminal facility in Jacksonville, Florida, through which rail traffic passes to and from the Florida peninsula. The corporation is jointly owned and controlled by four railroad carriers, including FEC, which enjoy the common use of the terminal's facilities and services, and share equally in its operation.[5]

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[5] The three other roads are the Atlantic Coast Line Railroad Co., the Seaboard Air Line Railroad Co., and the Southern Railway

FEC carries on substantial daily operations at the terminal, interchanging freight cars with the other railroads; it accounts for approximately 30% of all interchanges on the premises. Respondent provides various services necessary to FEC's operations, including switching, signalling, track maintenance, and repairs on FEC cars and engines. Without the work and cooperation of employees of respondent (and the other railroads) FEC could not carry on its normal activities at the terminal. In short, "despite the legal separateness of the Terminal Company's entity and operation, it cannot be disputed that the facilities and services provided by the Terminal Company *in fact* constitute an integral part of the day-to-day operations of the FEC . . . ." *Railroad Trainmen* v. *Atlantic C. L. R. Co.,* 362 F. 2d 649, 651 (1966).

Respondent maintains a "reserved gate" for the exclusive use of all FEC employees entering the terminal premises on foot to begin their workday. Notices to this effect are posted, but compliance is not policed: FEC employees use other entrances as well, and other employees use the FEC reserved entrance. The terminal has a number of other foot, road, and rail entrances, through which pass employees of respondent and the railroads using the premises. No entrances are set aside to separate those employees of respondent and the other railroads who provide services for FEC from those who do not; nor, with one or two possible exceptions, do trains making interchanges with FEC pass through different gateways from those which do not. The joint and

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System. Effective July 1, 1967, Coast Line and Seaboard merged. See *Florida E. C. R. Co.* v. *United States,* 259 F. Supp. 993 (1966), aff'd, 386 U. S. 544 (1967).

For a discussion of one aspect of this unusual joint venture agreement, see *Jacksonville Terminal Co.* v. *Florida E. C. R. Co.,* 363 F. 2d 216 (1966).

common use of the premises and facilities would, presumably, render such separations impracticable.

On May 4, 1966, petitioners began to picket almost every entrance to the terminal. The signs stated clearly that the dispute was with FEC alone, and urged "fellow railroad men" not to "cross" and not to "assist FEC."[6] The picketing was entirely peaceful. It lasted only a few hours, until it was curtailed by a federal temporary restraining order, and thereafter by a series of federal and state injunctions.

The Florida Circuit Court found that resumption of general picketing "would result in a virtual cessation of activities . . . of the Terminal Company," and would cause serious economic damage to the entire State. Joint App. 183. The court held that the picketing constituted a secondary boycott illegal under state law; that it unjustifiably interfered with respondent's business relations; that it violated the State's restraint of trade laws, Fla. Stat. § 542.01 *et seq.* (1965); and that it sought to force respondent to violate its duties as a carrier under the Florida Transportation Act.[7] On this basis, the court enjoined petitioners from picketing the terminal except at the FEC reserved gate, and from causing or inducing respondent's employees to cease performing their duties of employment in connection with the FEC dispute.

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[6] The signs read:

"Fellow Railroad Men
Do Not Cross or Assist F. E. C.
B. of R. T.
On Lawful
Strike
Against F. E. C.
Please Make Common Cause With Us In
Major Dispute Against F. E. C."

A union official directing the picketing testified at the state hearing that picket lines at the rail entrances would have been taken down to allow movements unconnected with FEC to pass.

[7] Fla. Stat. §§ 351.12, 351.14–351.17, 351.19 (1965). These are duties, in essence, to transport and transfer freight and freight cars.

II.

We consider initially petitioners' argument that the jurisdiction of the Florida court was ousted by the primary and exclusive jurisdiction of the National Labor Relations Board. Cf. *San Diego Unions* v. *Garmon,* 359 U. S. 236 (1959).

It is not disputed that petitioners, the respondent and its employees, and the railroads (including FEC) that use the terminal as well as their employees, are subject to the Railway Labor Act. See §§ 1 First, Fourth, 44 Stat. 577, as amended, 45 U. S. C. §§ 151 First, Fourth; Interstate Commerce Act, as amended, § 1 (3), 24 Stat. 379, 49 U. S. C. § 1 (3). The petitioner organizations "are composed predominantly and overwhelmingly of employees . . . subject to the Railway Labor Act," Joint App. 93; all pickets were members of local lodges composed solely of such employees, and were employees of the FEC. *Id.,* at 94. However, the organizations' national membership includes a small percentage of employees who are not subject to the Railway Labor Act,[8] and who may be subject to the National Labor Relations Act, 49 Stat. 449, as amended by the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. § 151 *et seq.* Petitioners contend that this is sufficient to bring the present dispute arguably within the NLRA, and they assert that until the National Labor Relations Board decides otherwise, no court may assume jurisdiction over the controversy. Cf. *Marine Engineers* v. *Interlake Steamship Co.*, 370 U. S. 173 (1962).[9]

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[8] Seven percent of the BRT, 7% of the BLF&E, and 2% of the ORC&B are "employees of employers who are not subject to the Railway Labor Act." Joint App. 93–94.

This argument proves too much. For on petitioners' theory, it is hard to conceive of any railway labor dispute that is not "arguably" subject to the NLRB's primary jurisdiction. A serious question would be presented whether the parties to such a dispute were ever obligated to pursue the Railway Labor Act's procedures, and whether the Mediation and Adjustment Boards could ever concern themselves with a dispute—until the matter had first been submitted to the NLRB and that agency had determined that it lacked jurisdiction.

This was not meant to be. The NLRA came into being against the background of pre-existing comprehensive federal legislation regulating railway labor disputes. Sections 2 (2) and (3) of the NLRA, 29 U. S. C. §§ 152 (2), (3), expressly exempt from the Act's coverage employees and employers subject to the Railway Labor Act.[10] And when the traditional railway labor organi-

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[9] In *Marine Engineers*, a state court enjoined picketing by the Marine Engineers Beneficial Association, having found that the union represented only "supervisors," who are not "employees" subject to the NLRA. NLRA § 2 (3). We noted that decisions of the NLRB and lower courts had held the MEBA subject to the Act under some circumstances, and we reversed, holding that in any "doubtful case," 370 U. S., at 182, where there existed an "arguable possibility of Labor Board jurisdiction," *id.*, at 184, the matter must first be submitted to the NLRB.

[10] In the debates preceding enactment of the Taft-Hartley amendments, 61 Stat. 141, 29 U. S. C. § 158 (b), Senator Taft responded as follows to the criticism that it was inequitable to allow railroad employees to engage in conduct forbidden others by § 8 (b)(4) of the NLRA:

"I want to point out that railway labor has never been covered by the Wagner Act; it has always been covered by the Railway Labor Act, which provides a somewhat different procedure. We saw no reason to change that situation, because there were no abuses which zations act on behalf of employees subject to the Railway Labor Act in a dispute with carriers subject to the Railway Labor Act, the organizations must be deemed, *pro tanto,* exempt from the National Labor Relations Act. See NLRA § 2 (5), 29 U. S. C. § 152 (5). *Marine Engineers, supra,* is inapposite. For assuming, *arguendo,* that this is a "doubtful case," 370 U. S., at 182, we were not there concerned with a conflict between two independent and mutually exclusive federal labor schemes.

Whatever might be said where railway organizations act as agents for, or as joint venturers with, unions subject to the NLRA, see *Electrical Workers* v. *NLRB,* 122 U. S. App. D. C. 8, 350 F. 2d 791 (1965); or where railway unions are engaged in a dispute on behalf of their nonrail employees; or where a rail carrier seeks a remedy against the conduct of nonrailway employees, see *Steelworkers* v. *NLRB,* 376 U. S. 492, 501 (1964); *Teamsters Union* v. *New York, N. H. & H. R. Co.,* 350 U. S. 155 (1956), none of these is this case. This is a railway labor dispute, pure and simple. And although we shall make use of analogies drawn from the NLRA to determine the rights of employees subject to the Railway Labor Act, see *infra,* Parts V–VII, the NLRA has no direct application to the present case.

III.

The heart of the Railway Labor Act is the duty, imposed by § 2 First upon management and labor, "to

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had arisen in connection with the operation of the Railway Labor Act." 93 Cong. Rec. 6498, 2 Legislative History of the Labor Management Relations Act, 1947, p. 1571.

In 1959, § 8 (b)(4) was amended to expand the class of persons protected against secondary pressures. 73 Stat. 542; see *Steelworkers* v. *NLRB,* 376 U. S. 492, 500–501 (1964). However, the amendment did not expand the scope of "employees" or "labor organizations" whom the Act forbade to engage in such conduct.

exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

The Act provides a detailed framework to facilitate the voluntary settlement of major disputes. A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President," who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10.

Nowhere does the text of the Railway Labor Act specify what is to take place once these procedures have been exhausted without yielding resolution of the dispute. Implicit in the statutory scheme, however, is the ultimate right of the disputants to resort to self-help— "the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration." *Florida E. C. R. Co.* v. *Railroad Trainmen,* 336 F. 2d 172, 181 (1964). We have consistently so held in a long

line of decisions. *Railway Clerks* v. *Florida E. C. R. Co.*, 384 U. S. 238, 244 (1966); *Locomotive Engineers* v. *Baltimore & O. R. Co.*, 372 U. S. 284 (1963); *Railroad Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U. S. 330 (1960); *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 725 (1945).

Both before and after enactment of the Railway Labor Act,[11] as well as during congressional debates on the bill itself,[12] proposals were advanced for replacing this final resort to economic warfare with compulsory arbitration and antistrike laws. But although Congress and the Executive have taken emergency *ad hoc* measures to compel the resolution of particular controversies,[13] no such general provisions have ever been enacted. And for the settlement of major disputes,

> "the statutory scheme retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration, and conciliation. Every facility for bringing about agreement is provided

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[11] See generally L. Lecht, Experience under Railway Labor Legislation 38, 46–47, 197–198, 221–222, 230–237 (1955); Use of Federal Power in Settlement of Railway Labor Disputes, H. R. Doc. No. 285, 67th Cong., 2d Sess., 76–85 (1922).

[12] See 67 Cong. Rec. 4508, 4512–4513, 4517–4518, 4569, 4582, 4648, 4702, 8814, 9205–9206 (1926).

[13] *E. g.*, Act of Aug. 28, 1963, Pub. L. 88–108, 77 Stat. 132. The Senate Report stated: "This proposal is not and cannot conceivably be considered as a precedent for the railroad industry . . . . It is what it purports to be—a one-shot solution through legislative means to a situation which imperiled beyond question the economy and security of the entire Nation." S. Rep. No. 459, 88th Cong., 1st Sess., 7 (1963). See generally 1 Federal Legislation to End Strikes: A Documentary History, c. VI, Subcommittee on Labor of Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. (Comm. Print 1967); 2 *id.*, cc. X, XI; L. Lecht, Experience under Railway Labor Legislation 176–177, 184–185, 195–196, 200–201, 206–207 (1955).

> and pressures for mobilizing public opinion are applied. The parties are required to submit to the successive procedures designed to induce agreement. § 5 First (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration." *Elgin, J. & E. R. Co.* v. *Burley, supra,* at 725.

IV.

We have not previously had occasion to consider whether the Railway Labor Act circumscribes state power to regulate economic warfare between disputants subject to the Act. Read narrowly, the decisions cited above, at 379, do no more than negate the "implication" of an independent federal remedy against self-help,[14] and do not foreclose a State from bringing its own sanctions to bear on such conduct. On this theory, once the Act's required processes have been exhausted, a State would be free to impose whatever restrictions it wished on the parties' use of self-help.

The Act is silent on this question, as is its legislative history.[15] We think it clear, however, that the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes. The disputants' positions in the course of negotiation and mediation, and their willingness to submit to binding arbitration or abide by the recommendations of a presidential commission, would be seriously affected by the knowledge that after these procedures were exhausted a State would, say, prohibit the employees from striking or prevent the railroad from taking measures necessary to continue operating in the face of a strike. Such interference would be compounded if the disputants were—as they frequently would be—subjected to various and divergent state laws. Railway (and airline[16]) labor disputes typically present problems of national magnitude. A strike in one State often paralyzes transportation in an entire section of the United States, and transportation labor disputes frequently result in simultaneous work stoppages in many States.

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[14] Cf., *e. g., Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192 (1944). See Note, Implying Civil Remedies from Federal Regulatory Statutes, 77 Harv. L. Rev. 285 (1963).

[15] What little relevant legislative history we have found, however, indicates that in opting for the voluntary settlement of railway labor disputes, Congress intended to limit state authority to impose the rejected compulsions. See 67 Cong. Rec. 4706-4707 (1926).

The Railway Labor Act's entire scheme for the resolution of major disputes would become meaningless if the States could prohibit the parties from engaging in *any* self-help. And the potentials for conflict, see *San Diego Unions* v. *Garmon,* 359 U. S. 236, 249, 250 (1959) (concurring opinion), and for the imposition of inconsistent state obligations, cf. *Clearfield Trust Co.* v. *United States,* 318 U. S. 363 (1943), are simply too great to allow each State which happens to gain personal jurisdiction over a party to a railroad labor dispute to decide for itself what economic self-help that party may or may not pursue. The determination of the permissible range of self-help "cannot be left to the laws of the many States, for it would be fatal to the goals of the Act" if conduct were prohibited by state laws "even though in furtherance of the federal scheme. The needs of the subject matter manifestly call for uniformity." *Machinists* v. *Central Airlines, Inc.,* 372 U. S. 682, 691–692 (1963).

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[16] Air carriers and their employees were made subject to the Railway Labor Act in 1936. 49 Stat. 1189, 45 U. S. C. §§ 181, 182.

It follows that even though the Florida courts may have jurisdiction over this litigation, the application of state law is limited by paramount federal policies of nationwide import.

V.

We are presented, then, with the problem of delineating the area of labor combat protected[17] against infringement by the States. The text and legislative history of the Railway Labor Act, and the decisional law thereunder, provide little guidance. To refer to the "general" labor law, as it existed around the time the Act came into being, would be ahistorical. Like forays into economic due process, see *Ferguson* v. *Skrupa,* 372 U. S. 726 (1963); *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 488 (1955), this judge-made law of the late 19th and early 20th centuries was based on self-mesmerized views of economic and social theory, see F. Frankfurter & N. Green, The Labor Injunction 1–46, 199–205 (1930); A. Cox & D. Bok, Cases on Labor Law 101–105 (5th ed. 1962), and on statutory misconstruction, see *United States* v. *Hutcheson,* 312 U. S. 219 (1941). We need not hold that the Norris-LaGuardia Act applies directly to this case[18] to find in its enactment a clear disapproval of these free-wheeling judicial exercises. See *Meat Cutters* v. *Jewel Tea Co.,* 381 U. S. 676, 697, 700–709, 718 (1965) (separate opinion of Mr. Justice Goldberg).

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[17] In the context of labor relations law, this word is fraught with ambiguity. "Protected conduct" may, for example, refer to employee conduct which the States may not prohibit, see, *e. g., Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468, 474 (1955), or to conduct against which the employer may not retaliate, cf., *e. g., NLRB* v. *Truck Drivers,* 353 U. S. 87, 96 (1957). Throughout this opinion we use the word in the former sense only.

[18] The question whether the Norris-LaGuardia Act bars state courts from issuing labor injunctions was argued in a somewhat different context, but not decided, in *Avco Corp.* v. *Machinists,* 390 U. S. 557 (1968). It is argued here, but again we find no need to reach it.

To the extent that there exists today any relevant corpus of "national labor policy," it is in the law developed during the more than 30 years of administering our most comprehensive national labor scheme, the National Labor Relations Act. This Act represents the only existing congressional expression as to the permissible bounds of economic combat. It has, moreover, presented problems of federal-state relations analogous to those at bar. The Court has in the past referred to the NLRA for assistance in construing the Railway Labor Act, see, *e. g., Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192, 200–201 (1944); *Railroad Trainmen* v. *Toledo, P. & W. R. Co.,* 321 U. S. 50, 61, n. 18 (1944), and we do so again here. Indeed, even if we were to revive the "common law" of labor relations, the common law has always been dynamic and adaptable to changing times, and we would today look to these legislatively based principles for guidance. Cf. *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, 456–457 (1957).

It should be emphasized from the outset, however, that the National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes.[19] Cf. *Railroad Trainmen* v. *Chicago River &*

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[19] For example, in referring to decisions holding state laws pre-empted by the NLRA, care must be taken to distinguish pre-emption based on federal protection of the conduct in question, *e. g., Teamsters* v. *Oliver,* 358 U. S. 283 (1959); *Bus Employees* v. *Wisconsin Employment Relations Board,* 340 U. S. 383 (1951), from that based predominantly on the primary jurisdiction of the National Labor Relations Board, *e. g., San Diego Unions* v. *Garmon,* 359 U. S. 236 (1959), although the two are often not easily separable. See *NLRB*

I. R. Co., 353 U. S. 30, 31, n. 2 (1957). We refer to the NLRA's policies not in order to "apply" them to petitioners' conduct—for we conclude that this would be neither justified nor practicable—but only to determine whether it is within the general penumbra of conduct held protected under the Act or whether it is beyond the pale of any activity thought permissible.

In order to gain better perspective for viewing the central issue in this case—petitioners' alleged "secondary" activities—we examine first what we find to be polar examples of protected and unprotected conduct—primary strikes and picketing on the one hand, violence and intimidation on the other.

VI.

The Court has indicated, without reference to the National Labor Relations Act, that employees subject to the Railway Labor Act enjoy the right to engage in primary strikes over major disputes. In *Railway Clerks* v. *Florida E. C. R. Co.,* 384 U. S. 238, 244 (1966), we held that:

> "The unions, having made their demands and having exhausted all the procedures provided by Congress, were therefore warranted in striking. For the strike has been the ultimate sanction of the union, compulsory arbitration not being provided."

Similarly, in *Florida E. C. R. Co.* v. *Railroad Trainmen,* 336 F. 2d 172, 181 (1964), the Court of Appeals for the Fifth Circuit concluded that "when the machinery of industrial peace fails, the policy in all national labor legislation is to let loose the full economic power of each [party]. On the side of labor, it is the cherished right to strike." Whether the source of this right be found in

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v. *Insurance Agents,* 361 U. S. 477, 493–494, n. 23 (1960). There is, of course, no administrative agency equivalent to the NLRB with jurisdiction over railway labor disputes.

a particular provision of the Railway Labor Act[20] or in the scheme as a whole, it is integral to the Act. State courts may not enjoin a peaceful strike by covered railway employees, no matter how economically harmful the consequences may be. Cf. *Bus Employees* v. *Wisconsin Employment Relations Board,* 340 U. S. 383 (1951); *Automobile Workers* v. *O'Brien,* 339 U. S. 454 (1950).

The Court has consistently held peaceful primary picketing incident to a lawful strike to be protected conduct under the National Labor Relations Act. "Picketing has traditionally been a major weapon to implement the goals of a strike," *Steelworkers* v. *NLRB,* 376 U. S. 492, 499 (1964), and "it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing." *Garner* v. *Teamsters,* 346 U. S. 485, 500 (1953). We see no possible grounds for distinguishing picketing under the Railway Labor Act.

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[20] Cf. § 2 Fourth, 48 Stat. 1187, 45 U. S. C. § 152 Fourth: "Employees shall have the right to organize and bargain collectively through representatives of their own choosing." It has been suggested that this provision is "comparable" to § 7 of the NLRA, which grants employees the right to "self-organization" and the right to engage in "concerted activities . . . ," and which, even apart from § 13, protects the right to strike, see, *e. g., Bus Employees* v. *Wisconsin Employment Relations Board,* 340 U. S. 383, 389 (1951). Memorandum of Mar. 11, 1935, prepared for Senate Committee on Education and Labor comparing S. 1958 (74th Cong.) with S. 2926 (73d Cong.), 1 Legislative History of the National Labor Relations Act, 1935, at 1350–1351. However, § 2 Fourth of the RLA, added in 1934, was designed primarily, if not exclusively, to prohibit coercive employer practices. See H. R. Rep. No. 1944, 73d Cong., 2d Sess., 2 (1934); L. Lecht, Experience under Railway Labor Legislation, c. V (1955). The explicit language of § 7 of the NLRA was probably responsive to the difference between the "embryo organizations in the industries covered by" the NLRA, and the already "strongly organized" railway unions. Memorandum, *supra,* 1 Legislative History, *supra,* at 1329. For an indication of the economic power of railway labor organizations prior to enactment of the Railway Labor Act, see G. Eggert, Railroad Labor Disputes (1967).

Peaceful primary strikes and picketing incident thereto lie within the core of protected self-help under the Railway Labor Act.

On the other hand, the National Labor Relations Act gives no colorable protection to violent and coercive conduct incident to a labor dispute. *Allen-Bradley Local* v. *Wisconsin Employment Relations Board,* 315 U. S. 740, 750 (1942). The state interest in preventing "conduct marked by violence and imminent threats to public order" is compelling, *San Diego Unions* v. *Garmon,* 359 U. S. 236, 247 (1959), and such conduct may be enjoined by state courts. *Youngdahl* v. *Rainfair,* 355 U. S. 131 (1957); *Automobile Workers* v. *Wisconsin Employment Relations Board,* 351 U. S. 266 (1956). Cf. *Automobile Workers* v. *Russell,* 356 U. S. 634 (1958); *Construction Workers* v. *Laburnum Construction Corp.,* 347 U. S. 656 (1954). The federal concern for protecting such conduct when engaged in by railway employees is no less tenuous. The States' interest in preventing it is no less compelling.

VII.

Petitioners committed no acts of violence. But their picketing, albeit peaceful, could not be characterized as purely "primary." Respondent asserts, in essence, that, because the picketing had secondary aspects, it was necessarily unprotected and therefore subject to proscription by the state court. The matter, however, is not so simply resolved.

No cosmic principles announce the existence of secondary conduct, condemn it as an evil, or delimit its boundaries. These tasks were first undertaken by judges, intermixing metaphysics with their notions of social and economic policy. And the common law of labor relations has created no concept more elusive than that of "secondary" conduct; it has drawn no lines more arbitrary, tenuous, and shifting than those separating "primary" from "secondary" activities. See F. Frankfurter & N. Green, The Labor Injunction 43–46, 170 (1930); 1 L. Teller, Labor Disputes and Collective Bargaining § 145 (1940); E. Oakes, Organized Labor and Industrial Conflicts, § 407 *et seq.* (1927); Barnard & Graham, Labor and the Secondary Boycott, 15 Wash. L. Rev. 137 (1940); Hellerstein, Secondary Boycotts in Labor Disputes, 47 Yale L. J. 341 (1938). Cf. Aaron, Labor Injunctions in the State Courts—Pt. I: A Survey, 50 Va. L. Rev. 950, 971–977 (1964). For these reasons, as well as those stated above, at 382–383, this body of common law offers no guidance for the problem at hand.

It was widely assumed that, prior to 1947, the Norris-LaGuardia Act prevented federal courts from enjoining any "secondary boycotts." See 93 Cong. Rec. 4198 (remarks of Senator Taft); *Bakery Drivers* v. *Wagshal,* 333 U. S. 437, 442 (1948). Indeed, in an opinion written by Judge Learned Hand, the Court of Appeals for the Second Circuit held that secondary conduct was fully protected by the Wagner Act. *NLRB* v. *Peter Cailler Kohler Swiss Chocolates Co.,* 130 F. 2d 503 (1942). The 1947 Taft-Hartley amendments, 61 Stat. 140, and the 1959 Landrum-Griffin amendments, 73 Stat. 545, explicitly narrowed the scope of protected employee conduct under the National Labor Relations Act; §§ 8 (b)(4) and 8 (e) of the Act proscribed a variety of secondary activities.[21] But Congress enacted "no . . . sweeping prohibition" of secondary conduct. *Carpenters* v. *NLRB,* 357 U. S. 93, 98 (1958). And despite their relative precision of language,[22] the experience under these amendments amply demonstrates that—as at common law—bright lines cannot be drawn between "legitimate 'primary activity' and banned 'secondary activity' . . . ." *Electrical Workers* v. *NLRB,* 366 U. S. 667, 673 (1961).

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[21] Petitioners contend that Senator Taft's statement, during the congressional debates, that § 8 (b)(4) did not apply to persons subject to the Railway Labor Act, *supra,* n. 10, necessarily entails that the Railway Labor Act protects secondary conduct. But, except under unusual circumstances, the NLRA in its entirety is inapplicable to such persons. Part II, *supra.* It would be inappropriate to give any weight to these isolated passing remarks about one statutory scheme made in the context of amending an entirely different one.

The fuzziness of this distinction stems from the overlapping characteristics of the two opposing concepts, and from the vagueness of the concepts themselves. The protected primary strike "is aimed at applying economic pressure by halting the day-to-day operations of the struck employer," *Steelworkers* v. *NLRB,* 376 U. S. 492, 499 (1964); and protected primary picketing "has characteristically been aimed at all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt," *ibid.,* including other employers and their employees. "The gravamen of a secondary boycott," on the other hand, "is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands." *Electrical Workers* v. *NLRB,* 181 F. 2d 34, 37 (1950); see also *Woodwork Manufacturers* v. *NLRB,* 386 U. S. 612, 623 (1967). These principles often come into conflict, and attempts to harmonize them in the context of § 8 (b)(4) of the National Labor Relations Act have created ramified sets of rules.

The problem of delineating the scope of permissible picketing at a "common situs"—a place, such as respondent's terminal, where both the struck employer and "secondary" or "neutral" employers are carrying on business activities—has been among the most mooted and complex under the Act. See generally *Electrical Workers* v. *NLRB,* 366 U. S. 667, 674–679 (1961); *Moore Dry Dock Co.,* 92 N. L. R. B. 547 (1950); Lesnick, The Gravamen of the Secondary Boycott, 62 Col. L. Rev. 1363 (1962); Koretz, Federal Regulation of Secondary Strikes and Boycotts—Another Chapter, 59 Col. L. Rev. 125 (1959). It is difficult to formulate many generalizations governing common situs picketing, but it is clear that secondary employers are not necessarily protected against picketing aimed directly at their employees. In *Electrical Workers* v. *NLRB, supra,* for example, we noted that striking employees could picket at a gate on the struck employer's premises which was reserved exclusively for employees of the secondary employer, to induce those employees to refuse to perform work for their employer which was connected with the struck employer's normal business operations. The Court affirmed this principle in *Steelworkers* v. *NLRB, supra,* where it held that striking employees could picket to induce a neutral railroad's employees to refuse to pick up and deliver cars for the struck employer—even though the picketed gate was owned by the railroad, and the railroad's employees would have to pass by the place of picketing to pick up and deliver cars for other plants that were not struck.

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[22] Section 8 (b)(4) "does not speak generally of secondary boycotts . . . [but] describes and condemns specific union conduct directed to specific objectives." *Carpenters* v. *NLRB, supra,* at 98.

If the common situs rules were applied to the facts of this case—considering, for example, FEC's substantial regular business activities on the terminal premises, FEC's relationships with respondent and the other railroads using the premises,[23] the mixed use in fact of the purportedly separate entrances, and the terminal's characteristics which made it impossible for the pickets to single out and address only those secondary employees engaged in work connected with FEC's ordinary operations on the premises—the state injunction might well be found to forbid petitioners from engaging in conduct protected by the National Labor Relations Act. The fact that respondent, the other roads, or other industries in the State suffered serious economic injury as a consequence of petitioners' activities would not, of course, in itself render the picketing unlawful. *Woodwork Manufacturers* v. *NLRB*, 386 U. S. 612, 627 (1967); see *NLRB* v. *Fruit & Vegetable Packers*, 377 U. S. 58 (1964); cf. *Bus Employees* v. *Wisconsin Employment Relations Board*, 340 U. S. 383 (1951).

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[23] Cf. also *Railroad Trainmen* v. *Atlantic C. L. R. Co.,* 362 F. 2d 649, 654–655 (1966); *NLRB* v. *Electrical Workers,* 228 F. 2d 553 (1955); *Douds* v. *Architects,* 75 F. Supp. 672 (1948).

In short, to condemn all of the petitioners' picketing which carries any "secondary" implications would be to paint with much too broad a brush.

VIII.

We have thus far concluded that although the Florida courts are not pre-empted of jurisdiction over this cause, Part II, *supra*, the issues therein are governed by federal law, Parts III, IV, *supra;* that the Railway Labor Act permits railway employees to engage in *some* forms of self-help, free from state interference, *ibid.;* and, drawing upon labor policies evinced by the National Labor Relations Act, Part V, *supra*, that such protected self-help includes peaceful "primary" strikes[24] and nonviolent picketing in support thereof, Part VI, *supra*, and that it cannot categorically be said that *all* picketing carrying "secondary" implications is prohibited, Part VII, *supra*. Given these conclusions, it remains to be considered whether, under the present framework of congressional legislation, this Court should undertake precisely to mark out which of the petitioners' picketing activities at respondent's premises are federally protected, and therefore immune from state interference, and which of them are subject to prohibition by the State. We believe that such a course would be a wholly inappropriate one for us to take in the absence of a much clearer manifestation of congressional policy than is to be found in existing laws.

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[24] The right to strike finds support, not only in analogy to the NLRA, but in the history of, and decisions under, the Railway Labor Act itself. *Supra*, at 379–380, 384.

Certainly we could not proceed to such a task under the common law of labor relations. For even on the unjustified hypothesis that all secondary conduct is necessarily wrongful, we would lack meaningful standards for separating primary from secondary activities. Nor do the terms of the Railway Labor Act offer assistance. As we have indicated, the Act is wholly inexplicit as to the scope of allowable self-help.

Nor can we properly dispose of this case simply by undertaking to determine to what precise extent petitioners' picketing activities would be protected or proscribed under the terms of the National Labor Relations Act. For although, in the absence of any other viable guidelines, we have resorted to the NLRA for assistance in mapping out very general boundaries of self-help under the Railway Labor Act, there is absolutely no warrant for incorporating into that Act the panoply of detailed law developed by the National Labor Relations Board and courts under § 8 (b)(4). The NLRA, as we have noted, exempts employees who are subject to the Railway Labor Act, *supra,* at 376–377; and the inapplicability of § 8 (b) to railroad employees was specifically pointed out during the congressional debates on the NLRA, *supra,* at 376–377, n. 10.

Even if the task of adapting the NLRA's principles to railway disputes could be managed and implemented by an agency with administrative expertise, but cf. *NLRB* v. *Insurance Agents,* 361 U. S. 477, 497–498 (1960), Congress has invested no agency with even colorable authority to perform this function. The very complexity of the distinctions examined in Part VII, *supra,* if nothing else, plainly demonstrates that we lack the expertise and competence to undertake this task ourselves.

Moreover, "[f]rom the point of view of industrial relations our railroads are largely a thing apart. . . . 'The railroad world is like a state within a state.'" *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711, 751 (1945) (Frankfurter, J., dissenting). Thus, if Congress should now find that abuses in the nature of secondary activities have arisen in the railroad industry, see *supra,* at 376–377, n. 10, it might well decide—as it did when it considered the garment and construction industries, see NLRA § 8 (e)—that this field requires extraordinary treatment of some sort. Cf., *e. g., Railroad Trainmen* v. *Atlantic C. L. R. Co.,* 362 F. 2d 649, 654–655 (1966). Certainly, it is for the Congress, and not the courts, to strike the balance "between the uncontrolled power of management and labor to further their respective interests." *Carpenters* v. *NLRB,* 357 U. S. 93, 100 (1958); see *Woodwork Manufacturers* v. *NLRB,* 386 U. S. 612 (1967); *id.,* at 648–650 (separate memorandum). The Congress has not yet done so.

In short, we have been furnished by Congress neither usable standards nor access to administrative expertise in a situation where both are required. In these circumstances there is no really satisfactory judicial solution to the problem at hand. However, we conclude that the least unsatisfactory one is to allow parties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute to employ the full range of whatever peaceful economic power they can muster, so long as its use conflicts with no other obligation imposed by federal law. Hence, until Congress acts, picketing—whether characterized as primary or secondary—must be deemed conduct protected against state proscription.[25] Cf. *Electrical Workers* v. *NLRB*, 122 U. S. App. D. C. 8, 9–10, 350 F. 2d 791, 792–793 (1965) (dissenting opinion); *NLRB* v. *Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. 2d 503 (1942). Any other solution—apart from the rejected one of holding that *no* conduct is protected—would involve the courts once again in a venture for which they are institutionally unsuited.

The judgment of the Florida District Court of Appeal is accordingly

Reversed.

MR. JUSTICE FORTAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE STEWART concur, dissenting.

Respondent provides terminal facilities for four railroads at Jacksonville, Florida. Petitioners have a long-standing labor dispute with one of those carriers, Florida East Coast. They have established a picket line, manned by employees of FEC but established at all entrances and exits to the Terminal and not restricted to the single entrance designated[1] for use by FEC employees. The conceded purpose of the picketing was to cause respondent and the other three carriers not to interchange traffic with FEC.

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[25] Our holding is, of course, limited to disputes subject to the Railway Labor Act, and in no way detracts from the power of the States to regulate labor conduct not otherwise governed by a paramount federal scheme. Cf. *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490 (1949).

[1] When the strike started on January 23, 1963, respondent designated a special gate for the exclusive use of FEC employees who report to work at the Terminal.

The strike originally involved only nonoperating employees of FEC. But in 1966 the operating unions also went on strike against FEC.

Petitioner Brotherhood of Railroad Trainmen, however, has no labor dispute with any carrier using the Terminal except FEC. The Florida court found that the pattern of picketing being used "would result in a virtual cessation of activities not only of the Terminal Company but also of numerous industries in Duval County and . . . Florida."

The order entered[2] barred all picketing by FEC employees except at the designated single entrance. The trial court relied, *inter alia,* on the ground that "[t]he past and threatened picketing seeks to coerce plaintiff [respondent] into embargoing the FEC in violation of the Restraint of Trade Laws of this State." The laws referred to are Fla. Stat. § 542.01 *et seq.* which set up a broad regulatory scheme banning "a combination of capital, skill or acts by two or more persons" to "create or carry out restrictions in trade or commerce." The District Court of Appeal, in affirming the trial court in the present case, said that it "exercised a proper authority in enjoining a violation of a valid state statute." 201 So. 2d 253, 254.

The question therefore is whether Florida may ban picketing[3] in support of a secondary boycott.

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[2] We were asked to review a temporary injunction issued by the trial court. See 385 U. S. 935. The permanent injunction, now here, was affirmed *per curiam* by the District Court of Appeal, 201 So. 2d 253, and the Florida Supreme Court dismissed an appeal and denied certiorari.

[3] The picketing was first enjoined by the Federal District Court in a proceeding brought by two carriers (other than FEC) and the Terminal Company. That judgment was reversed by the Court of Appeals which held that the requirements of the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. § 101 *et seq.* had not been met. 362 F. 2d 649.

We affirmed the Court of Appeals by an equally divided Court. 385 U. S. 20.

Congress could pre-empt this field of picketing any rail carrier for purposes of a secondary boycott as our rail carriers and their labor problems are conspicuously within reach of the Commerce Clause. Congress in the Labor Management Relations Act of 1947, 29 U. S. C. § 141 *et seq.* did legislate on secondary boycotts.[4] 29 U. S. C. § 158 (b)(4)(i)(B). But it expressly excluded from that regulatory scheme [5] "any person subject to the Railway Labor Act," § 152 (2), and any individual employed by such person, § 152 (3).

We are therefore in an area where Congress has not legislated and, as I see it, the case is controlled by *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490.

In *Giboney,* Missouri applied its anti-trade-restraint law to enjoin a union from picketing employers to enforce a secondary boycott. We stated that the basic issue was "whether Missouri or a labor union has paramount constitutional power to regulate and govern the manner in which certain trade practices shall be carried on" in Missouri. *Id.,* at 504. A State's power over secondary boycotts was held to be paramount; and that is what we should hold today, since Congress has not pre-empted the subject.

It is suggested that there is an hiatus which this Court should fill. To do so, we would have to fill in large gaps between the Railway Labor Act, 45 U. S. C. § 151 *et seq.,* and many other specialized Acts of Congress that touch on pieces of the problems of labor in the railroad field. Once the remedies provided in the Railway Labor Act are exhausted, federal administrative remedies are at an end. No authority is empowered to settle the dispute;

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[4] See, *e. g., NLRB* v. *Rice Milling Co.,* 341 U. S. 665; *Electrical Workers* v. *NLRB,* 366 U. S. 667; *Steelworkers* v. *NLRB,* 376 U. S. 492.

[5] See S. Rep. No. 105, 80th Cong., 1st Sess., 19; *Teamsters Union* v. *New York, N. H. & H. R. Co.,* 350 U. S. 155, 159–160.

no compulsory arbitration is provided. The conditions of work may be as bad as the employees suffer them to be and made as good as they can agree upon through bargaining. When the various procedures established by the Act are exhausted, "both parties . . . are relegated to self-help in adjusting" the dispute. *Locomotive Engineers* v. *Baltimore & O. R. Co.,* 372 U. S. 284, 291.

Legislating interstitially is one thing; judicial insertion into our federal railway labor law of rules governing secondary boycotts is formulation of national policy in the raw. Whether it should be done and, if so, how, are matters for the Senate and the House.

The effort of the Court to find support for this secondary boycott in federal law is a masterful endeavor. The opinion is indeed a brilliant brief for a federal law to support the struggle of petitioners to end the ugly conflict. The difficulty is that no matter how carefully federal law is examined no express sanction for what petitioners can do can be found. Federal authority for what they do rests on the thinnest of inferences and yet that inference is brought under the Supremacy Clause.

Article VI of the Constitution states that: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ." But one looks in vain for any federal "law" that collides with state law or that can be said to pre-empt state law. Federal law says that when the parties exhaust their remedies under the Railway Labor Act they may resort to "self-help"—not a congressional phrase but a judicial gloss put on the Act. *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711, 725. But it is strong medicine to say that their right to "self-help" overrides state law. Certainly it does not when violence is used to injure people and destroy property. *Allen-*

Bradley Local v. *Wisconsin Employment Relations Board,* 315 U. S. 740. For then the States have an arsenal of authority to deal with the situation. Why is that power greater than the power to protect the economy of the area? We have a finding that, if the conduct which the Court authorizes continues, there will be serious injury to "numerous industries in Duval County"—industries that have no responsibility for the labor dispute.

The question, says the Court, is whether "the States could prohibit the parties from engaging in *any* self-help." If that is true, then the Act's scheme would be impaired. But that is not the issue. It is whether the State can prevent a secondary boycott which threatens to paralyze a whole community. If a State cannot fill that hiatus in a federal scheme, then much law will have to be unlearned.

States' rights are often used as a cloak to cover unconstitutional encroachments such as the maintenance of second-class citizenship for Negroes or Americans of Mexican ancestry. But a state policy to confine an industrial dispute to the parties and, if possible, not to let it paralyze the entire community cannot be put in that category.

Congress in adopting a federal regulation can make it exclusive of all state regulation, in which event one may not be required "by a State to do more or additional things or conform to added regulations, even though they in no way conflicted with what was demanded of him under the Federal Act." *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218, 236. And see *Campbell* v. *Hussey,* 368 U. S. 297, 300–301. But that principle, though uniformly recognized, has provoked much dissent in its application, as the dissents in the *Rice* and *Campbell* cases illustrate.

As Mr. Justice Brandeis said in *Napier* v. *Atlantic Coast Line,* 272 U. S. 605, 611, "The intention of Congress to exclude States from exerting their police power must be clearly manifested." And the Court, mindful of the force of the Tenth Amendment and the place of the States in our constitutional system, has resolved close cases in favor of a continuing power on the part of the States to legislate in their customary fields and thus has permitted state regulations to mesh with federal controls. See *Federal Compress Co.* v. *McLean,* 291 U. S. 17; *Townsend* v. *Yeomans,* 301 U. S. 441, 454; *Penn Dairies* v. *Milk Control Commission,* 318 U. S. 261.

Even here, there have been dissents when it came to particular applications of the principle to the facts of a case. But I venture that in no case prior to today's decision has a State been barred from legislating in a field which is not specifically touched by the federal regulation and which remains after the federal remedies have spent themselves and proved to be of no avail.

The States should be allowed a free hand in labor controversies except and unless Congress has adopted a contrary policy. We search in vain for any such federal law in this context.

I would affirm the judgment.

IN RE HERNDON.

ON MOTION FOR ORDER TO SHOW CAUSE WHY JUDGE HERNDON SHOULD NOT BE HELD IN CONTEMPT.

No. —. Argued January 21, 1969.—Decided March 25, 1969.

Decision on motion that this Court initiate a contempt proceeding against Greene County, Ala., Probate Judge for allegedly disobeying this Court's order in *Hadnott* v. *Amos, ante*, p. 358, restoring the District Court's temporary restraining order, deferred pending timely initiation and completion of proceedings in the District Court to determine whether the Judge's failure to place certain candidates on the ballot constituted contempt of the District Court.

Charles Morgan, Jr., argued the cause for movants. With him on the brief were *Reber F. Boult, Jr., Orzell Billingsley, Jr., Robert P. Schwenn, Melvin L. Wulf,* and *Eleanor Holmes Norton.*

Perry Hubbard argued the cause for Herndon. With him on the brief was *George A. LeMaistre.*

Louis F. Claiborne argued the cause for the United States as *amicus curiae.* With him on the brief were *Solicitor General Griswold, Assistant Attorney General Pollak, Nathan Lewin,* and *Frank M. Dunbaugh.*

PER CURIAM.

The appeal in *Hadnott* v. *Amos, ante,* p. 358, decided today, was argued with the motion filed by appellants on November 19, 1968, "for an order to show cause why Judge Herndon should not be held in contempt and for other relief." 393 U. S. 996.

On September 18, 1968, the three-judge court entered a temporary restraining order enjoining appropriate Alabama officials from using any ballots at the general election of November 5, 1968 which did not include the names of the candidates of the National Democratic Party of Alabama (NDPA). This order was dissolved on October 11, 1968, one judge dissenting. 295 F. Supp. 1003. The appellants sought interim relief from this Court pending appeal, and on October 14, 1968, we entered an order that: "The application for restoration of temporary relief is granted pending oral argument on the application . . . ." 393 U. S. 815 (1968). Oral argument was heard on October 18, and on October 19 we entered an order that: "The order entered on October 14, 1968, restoring temporary relief is continued pending action upon the jurisdictional statement which has been filed." 393 U. S. 904. Nevertheless, Judge Herndon, who was responsible for the preparation of the Greene County ballot for local offices, did not place the NDPA candidates for such offices on the ballot.

We conclude that decision on the motion should await timely initiation and completion of appropriate proceedings in the District Court to determine whether Judge Herndon's failure to place NDPA candidates on the ballot constituted contempt of the order of September 18 of the District Court. Decision on the motion is therefore postponed.

It is so ordered.

MR. JUSTICE BLACK took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, whom MR. JUSTICE HARLAN joins, dissenting.

This is a motion requesting that we initiate a proceeding against Herndon, Probate Judge in Greene County, Alabama, for disobedience of our order as described in No. 647, *Hadnott* v. *Amos, ante,* p. 358, decided this day. Our order, if obeyed, would have resulted in the black candidates, sponsored by the National Democratic Party of Alabama (NDPA), having been on the ballot for county offices in Greene County in the general election of November 1968. They were, it is alleged, left off the ballot due to the actions of Judge Herndon, as related in *Hadnott* v. *Amos*.

This motion, filed by appellants in No. 647, states they are informed and believe that Judge Herndon's failure to place these nominees on the ballot was done "wilfully and with actual knowledge of the order of this court." Judge Herndon filed his response to that motion, in which he denied that the omission of the NDPA candidates for county office was "willfully or contumaciously done with actual knowledge of the said orders of this court."

This motion was briefed and argued when No. 647 was presented on the merits.

I have studied the record and read the briefs; and as presently advised I think there is probable cause to conclude that Judge Herndon knowingly and purposefully evaded our order. What the ultimate conclusion will be depends, of course, on a full hearing at which Judge Herndon receives that notice and that opportunity to be heard which is required by due process. But if what appears to be probable cause matures into full-fledged findings, we have a flagrant violation of our order, which involves a vital problem of civil rights, involving the command of the Fifteenth Amendment, that extends the ballot to the blacks.

In a case of far less consequence the Court, proceeding by contempt on an information filed by the Attorney General, *United States* v. *Shipp,* 214 U. S. 386, 439, held a sheriff and his deputies in contempt for silent cooperation with a mob in hanging a prisoner whose case was before this Court. That sheriff acted by merely turning his back and letting the mob run wild. In the present case, if the facts alleged are proved, Judge Herndon's affirmative acts unlawfully kept the NDPA candidates off the ballot.

Rule 42 (a) of the Federal Rules of Criminal Procedure governs contempt in the presence of the court. Rule 42 (b) covers the contempt alleged here, *viz.*, disrespect or violation of this Court's order. Rule 42 (b) provides:

> "A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

I would issue the notice prescribed by Rule 42 (b), designate an attorney to represent the Court, appoint a Master, and get on with the hearings.

Reservation of action on the motion implicates the Double Jeopardy Clause. Successive federal prosecutions of the same person based on the same acts are prohibited by the Fifth Amendment.[1] See *United States* v. *Lanza*,

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[1] "Our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense." *Francis* v. *Resweber*, 329 U. S. 459, 462 (opinion of Reed, J.).

260 U. S. 377, 382; *Abbate* v. *United States,* 359 U. S. 187, 197 (opinion of BRENNAN, J.). It was held in *Pereira* v. *United States,* 347 U. S. 1, 9, that:

> "[A] defendant may be convicted of [two offenses] even though the charges arise from a single act or series of acts, so long as each requires the proof of a fact not essential to the other."

In the instant case, however, it is likely that the facts underlying both contempt charges will be identical. In fact, it may have been impossible for Judge Herndon to have violated one court order without violating the other.[2]

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[2] "The Constitutional safeguard [against double jeopardy] applies . . . [where] a person has been tried and convicted of a crime and it is sought to prosecute him again for the same or an included offense; [where] a person has been convicted and sentenced and an attempt is made to increase the sentence; [and where] a person has been acquitted after a trial on the merits and an endeavor is made to prosecute him again for the same or an included offense." *United States* v. *Whitlow,* 110 F. Supp. 871, 872 (D. C. D. C. 1953).

FEDERAL MARINE TERMINALS, INC. *v.* BURNSIDE SHIPPING CO., LTD.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 291. Argued January 15, 1969.—Decided April 1, 1969.

Petitioner, Marine Terminals, was hired by its affiliate, the time charterer of respondent's ship, to continue readying the vessel, then in Chicago, for its grain cargo. While that operation (which the ship's crew had begun) was in progress, one of petitioner's employees was killed by falling into an unprotected deep tank opening. The employee's widow filed a claim under the Longshoremen's and Harbor Workers' Compensation Act, and compensation was awarded against petitioner for weekly payments, the potential total liability for which is about $70,000. As administratrix of the estate the widow also filed a wrongful death action against respondent in the District Court, under an Illinois statute which then limited the amount recoverable to $30,000. Respondent sued Marine Terminals for indemnification for any judgment it might be required to pay in the wrongful death action, charging that petitioner's negligence had breached its warranty that services to the vessel would be performed "in a safe, workmanlike and seamanlike manner," and gave rise to an obligation to save respondent harmless from liability occasioned by the employee's death. Petitioner counterclaimed for compensation benefits paid or to be paid to the employee's dependents, alleging that respondent owed petitioner as stevedoring contractor, "the duty of providing and maintaining a safe place to work" which respondent allegedly breached by failing to protect the deep tank opening. The District Court granted respondent's motion to dismiss petitioner's counterclaim. Though it recognized the availability at common law in certain situations of a direct right over, the court concluded that petitioner's sole remedy is under § 33 of the Longshoremen's and Harbor Workers' Compensation Act, which provides that an employer paying compensation benefits to a deceased employee's representative may be subrogated to the rights of the representative against third persons. The Court of Appeals, holding the statutory remedy in any event exclusive, affirmed. *Held:*

1. Nothing on the face of § 33 of the Longshoremen's and Harbor Workers' Compensation Act or in the Act's legislative history limits the employer's remedy against third persons to subrogation

to the rights of the deceased employee's representative. Pp. 412–414.

2. Federal maritime law imposes on the shipowner a duty to the stevedoring contractor of due care under the circumstances and recognizes a direct tort action against the shipowner to recover the amount of compensation payments occasioned by the shipowner's negligence. Pp. 414–418.

3. Direct action otherwise than in tort by the stevedoring contractor against the shipowner may also be available. Pp. 418–422.

392 F. 2d 918, reversed and remanded.

John W. Hough argued the cause for petitioner. With him on the briefs was *Robert C. Keck*.

Paul McCambridge argued the cause for respondent. With him on the brief was *Lucian Y. Ray*.

MR. JUSTICE STEWART delivered the opinion of the Court.

Under § 33 of the Longshoremen's and Harbor Workers' Compensation Act,[1] an employer who pays compensa-

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[1] Section 33, as amended in 1959, 73 Stat. 391, as set forth in 33 U. S. C. § 933, reads as follows:

"(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

"(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

"(c) The payment [of such compensation into the fund established] in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as 'representative') to recover damages against such third person.

"(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may tion benefits to the representative of a deceased employee may be subrogated to the rights of the representative

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compromise with such third person either without or after instituting such proceeding.

"(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

"(1) The employer shall retain an amount equal to—

"(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);

"(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

"(C) all amounts paid as compensation;

"(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

"(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

"(f) If the person entitled to compensation institutes proceedings within the period prescribed in subdivision (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

"(g) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to [*sic*] under this chapter, the employer shall be liable for compensation as determined in subdivision (f) of this section only if such compromise is made with his written approval.

"(h) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier against third persons.[2] The question presented by this case is whether a stevedoring contractor whose longshoreman employee was killed in the course of his employment is limited to this subrogation remedy in seeking reimbursement from a shipowner on whose vessel the longshoreman met his death. Both the District Court[3] and the Court of Appeals[4] held that statutory subrogation is the stevedoring contractor's exclusive remedy against the shipowner, and we granted certiorari to consider this novel question under the Act.[5]

I.

According to the stipulation of facts, the M/V *Otterburn,* owned and operated by respondent Burnside Shipping Co., was under time charter to Federal Commerce and Navigation Co., a Canadian corporation affiliated with the petitioner, Federal Marine Terminals, Inc. Federal Commerce hired Marine Terminals to continue the operation, already commenced by the ship's crew, of preparing the vessel to receive a cargo of grain. While the ship was docked in Detroit, the crew had commenced installation of "grain feeders"—walled-in structures

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shall be subrogated to all the rights of the employer under this section.

"(i) The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided,* That this provision shall not affect the liability of a person other than an officer or employee of the employer."

[2] If the representative decides to bring suit against the third person within six months of the award, as in this case, the employer's liability for compensation is reduced by the amount recovered by the representative from the third person. See § 33 (f), *supra,* n. 1.

[3] 284 F. Supp. 740.

[4] 392 F. 2d 918.

[5] 393 U. S. 820.

erected in the 'tween deck hatches to the height of the main deck hatch. After Marine Terminals had been employed to continue the work of readying the ship for its cargo, the boatswain, acting on the instructions of the ship's Chief Officer, "winged out" the deep tank lids—that is, pulled them outboard into the wings of the 'tween deck. No railing, wire, or guard of any kind was placed around the resulting deep tank openings.

Marine Terminals' employees began working on the *Otterburn* after it had been removed to Chicago. On the morning of the third day of work, a group of Marine Terminals' stevedores, supervised by Gordon McNeill, arrived at approximately 7 o'clock to continue with carpentry work in the 'tween deck as part of the last stages of completing a grain feeder in the area of the "winged out" deep tank lids. McNeill was last seen alive shortly after 8 a. m. At 8:45 a. m. his lifeless body was discovered lying at the bottom of one of the deep tanks. There were no witnesses to his 30-foot fall.

McNeill's widow filed a claim for benefits under the Act for herself and three minor children, and the Department of Labor entered a compensation order for weekly payments of $36.75 to the widow and $33.25 to the children. The potential total liability of Marine Terminals for these payments is approximately $70,000. As administratrix of McNeill's estate, his widow also filed a maritime wrongful death action against Burnside Shipping Co. in the United States District Court for the Northern District of Illinois. Burnside answered the complaint, denying that McNeill's death had been caused by its negligence or by its failure to furnish a seaworthy vessel.

Burnside also commenced a separate action in the same court against Marine Terminals seeking indemnification for any judgment it might be required to pay in the wrongful death action. The libel charged that, by virtue of the agreement with the time charterer to prepare the ship for its cargo, Marine Terminals "warranted that its services to the vessel would be performed in a safe, workmanlike and seamanlike manner." That warranty was alleged to have been breached and the accident caused by Marine Terminals' negligence, giving rise to an obligation to save Burnside harmless from all liability and expense occasioned by McNeill's death.

Marine Terminals filed an answer denying most of the allegations of the libel, and also filed a counterclaim seeking damages from Burnside for "all sums which have been paid or will be paid" as compensation benefits to McNeill's dependents. The counterclaim alleged that Burnside, as owner and operator in control of the *Otterburn,* owed the stevedoring contractor "the duty of providing and maintaining a safe place to work so that injury to the employees . . . would be avoided." Burnside had violated that duty, according to the counterclaim, by its negligence

> "in failing to properly guard the deep tank opening, or make the passageway secure, or to cover up the said deep tank, and in failing to clear the passageways, and failing to provide adequate lighting in the area or to provide a safety railing around the deep tank opening, thereby causing, suffering and permitting the area and open deep tank to be a source of menace and danger."

Burnside moved to dismiss the counterclaim for failure to state a cause of action. Each party then filed a motion for summary judgment on its claim and counterclaim.

The District Court, finding that material factual disputes existed concerning the conduct of both parties, denied Burnside's motion for summary judgment on its complaint.[6] But it did grant the motion to dismiss Marine Terminals' counterclaim. The court noted Marine Terminals' concession that its theory of a direct action against the shipowner was novel. Normally the stevedoring contractor is content with its remedy of subrogation to the rights of the deceased longshoreman's representative against whatever third party may be liable for the death, usually the shipowner. In this case, however, the applicable Illinois Wrongful Death Act limited the amount recoverable by the decedent's representative to $30,000,[7] far short of Marine Terminals' potential liability of $70,000. The court recognized that "[t]he existence of such a direct right over is well established in certain situations,"[8] but concluded that the employer's rights provided by the Longshoremen's and Harbor Workers' Compensation Act are exclusive and "prevent him from maintaining an independent cause of action against the third party tortfeasor."[9]

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[6] The District Court found that crucial factual issues existed regarding the longshoremen's knowledge of the open hatch and the parties' relative duties of inspection. McNeill had been present at the time the hatch lids were "winged out," but the court noted that the factual question was posed whether McNeill could reasonably have assumed that the covers would be replaced and had merely entered the area to check it for safety.

[7] The Illinois Wrongful Death Act was amended in 1967 to remove the ceiling on damages, but the amendment was made prospective only, and the Act still limits the recovery to $30,000 "where such death occurs on or after July 8, 1957 and prior to the effective date [August 18, 1967] of this amendatory Act of 1967 . . . ." Ill. Rev. Stat., c. 70, § 2.

The District Court has reserved the question whether, suing as subrogee, the employer's recovery would be limited by the Illinois statute:

"In our judgment, defendant's theory of a direct action cannot be supported, and its counterclaim must be dismissed without prejudice to the filing of an amended counterclaim which alleges a cause of action derived from the persons entitled to compensation. If such an amendment *is* filed, we may then have occasion to consider whether as subrogee or assignee, the defendant's possible recovery is limited by the damage ceiling of the Illinois Wrongful Death Act." 284 F. Supp., at 744–745.

The Court of Appeals affirmed, agreeing that Marine Terminals' sole remedy is by subrogation under the Act. But while the District Court had implied that the stevedoring contractor would have had a direct action had it not been abrogated by the Act, the Court of Appeals appeared to assume that, in the absence of the statutory remedy, federal maritime law would permit no direct recovery from the shipowner:

> "There is no common law direct action as the defendant argues. There is only the Longshoremen's and Harbor Workers' Compensation Act which creates an entire legal procedure in this part of admiralty law. We cannot search outside of the Act for common law remedies which do not exist. The Act is the source of all remedies."[10]

This case thus presents two questions. First, does § 33 of the Act exclude whatever other rights of action the stevedoring contractor might have against the shipowner for compensation payments to an employee or his representative? Second, if statutory subrogation is not an exclusive remedy, does the shipowner owe the stevedoring contractor any duty whose breach will give rise to a direct action? We consider these questions in order below.

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[8] 284 F. Supp., at 744. The District Court noted that the petitioner's theory is summarized in § 96 of the Restatement of Restitution:

"A person who, without personal fault, has become subject to tort liability for the unauthorized and wrongful death of another, is entitled to indemnity from the other for expenditures properly made in the discharge of such liability."

[9] 284 F. Supp., at 744.

[10] 392 F. 2d, at 920.

II.

The Court of Appeals was clearly mistaken in its assertion that "[t]he statutory method provides that the [stevedoring contractor] can sue only as a subrogee."[11] Nothing on the face of § 33 of the Act purports to limit the employer's remedy against third persons to subrogation to the rights of the deceased employee's representative. The provision of § 33 that the employer's payment of compensation "shall operate as an assignment to the employer of all right of the legal representative of the deceased . . . to recover damages against such third person" contains no words of limitation. Congress thereby gave the employer, in return for his absolute liability to the employee's representative, part of the latter's rights against others. But the legislative grant of a new right does not ordinarily cut off or preclude other nonstatutory rights in the absence of clear language to that effect. When Congress imposed on the employer absolute liability for compensation, it explicitly made that liability exclusive.[12] Yet in the same Act it at-

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[11] *Ibid.*

[12] Section 5, 44 Stat. 1426, as set forth in 33 U. S. C. § 905, reads as follows:

"The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results tached no such exclusivity to the employer's action against third persons as subrogee to the rights of the employee or his representative.

Nothing in the legislative history of the Act remotely supports the construction adopted by the courts below. And we can perceive no reason why Congress would have intended so to curtail the stevedoring contractor's rights against the shipowner. The exclusivity of the statutory compensation remedy against the employer was designed to counterbalance the imposition of absolute liability; there is no comparable *quid pro quo* in the relationship between the employer and third persons. On the contrary, as we emphasized in *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, the Act is concerned only with the rights and obligations as between the stevedoring contractor and the employee or his representative. It does not affect independent relationships between the stevedoring contractor and the shipowner. Neither this Court[13] nor, before this case, any other

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from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

[13] Both the District Court and the Court of Appeals relied upon *Doleman* v. *Levine*, 295 U. S. 221, citing it for the proposition that the employer's "rights are derived from the person entitled to compensation." The decision, however, held only that, under the predecessor of § 33, the employer could not maintain a wrongful death action in his own name if he was subrogated to the rights of only one of the dependents entitled to bring the action. Not a word of the opinion in that case suggests that § 33 of the Act was the *only* source of the employer's rights against third persons for liability to his employees.

court[14] has held that statutory subrogation is the employer's exclusive remedy against third party wrongdoers, and we decline to so hold today.

III.

We must also reject the implication of the Court of Appeals' opinion that under federal maritime law the shipowner owed the stevedoring contractor no duties whose breach would give rise to a direct action for damages. As we held in *Kermarec* v. *Compagnie Generale Transatlantique,* 358 U. S. 625, 632, "the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." That duty of due care imposed by law extends to the stevedoring company as well as to others lawfully on the ship, and its breach gives rise to a cause of action for any damages proximately caused. It is not disputed, for example, that if the shipowner's negligence caused damages to the stevedoring contractor's equipment, those damages would be recoverable in a direct action sounding in tort. We can see no reason why the shipowner's liability does not in like fashion extend to the foreseeable obligations of the stevedoring contractor for compensation payments to the representative of a longshoreman whose death was occasioned by the shipowner's breach of his duty to the stevedoring contractor.

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[14] The District Court rested on the following rationale of the District Court for the Southern District of California in *California Casualty Indemnity Exchange* v. *United States,* 74 F. Supp. 401, 404:

"The right of recoupment [under the federal Act] on the ground of third party liability is not a right *created* in the libelants by Statute as in the California Compensation Act. . . . The difference lies in the fact that the rights of the employer and its insurance carrier under the Longshoremen's Act result solely by an assignment of the original rights of the injured person, which original rights are not created by the Statute. The act of the injured person, or representatives of decedent in seeking and accepting compensation under the Longshoremen's Act operates as an assignment of those rights and creates no new right of action in the employer as is done in the California Law. The assignee has and can have no greater right than the assignor. . . ."

It is clear even from the face of this passage, however, that the court in *California Casualty* was addressing itself to a different question from that presented by the instant case. The plaintiffs there had brought suit "as subrogee insurance carrier[s]," *id.,* at 403, and the holding was only that when the employer or his insurance carrier sues *as subrogee,* his rights are derived from and therefore identical to those of the employee. The case did not hold that the employer's remedy as subrogee is exclusive.

Nor did the District Court for the Northern District of Ohio so hold in *Reiss S. S. Co.* v. *Cyr,* 138 F. Supp. 834, aff'd, 229 F. 2d 849, another case relied on by the District Court below. Language in the *Reiss* opinion to the effect that § 33 "governs exclusively in instances of third party liability," *id.,* at 836, referred only to the relationship between employer and employee under the Act, not to the relationship between the employer and third parties.

We do not, of course, hold that the shipowner's duty to the employer is the same as to the employee. Nor do we disapprove the Court of Appeals' holding that the shipowner does not owe to the stevedoring contractor the absolute duty of seaworthiness owed to individual longshoremen.[15] But Marine Terminals' counterclaim in this action did not rely on the unseaworthiness of the ship. Rather it charged that Burnside had been negligent in certain particular respects.[16] And we have suggested before this that, while "the duties owing from [the shipowner] to [the longshoreman] were not identical with those from [the shipowner] to [the stevedoring contractor]," the shipowner can be negligent with respect to the stevedoring contractor as well as to the longshoreman. *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, 568.[17] Neither court below reached the question whether the counterclaim sufficiently alleged a breach of the duties owed by Burnside to Marine Terminals, and relevant factual questions remain unresolved. With the case in its present posture, therefore, we express no opinion as to whether the conduct of Burnside's employees amounted to a breach of the duty it owed to Marine Terminals.[18] We hold only that federal mari-

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[15] See *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85; *Mahnich* v. *Southern S. S. Co.,* 321 U. S. 96.

[16] See *supra,* at 409.

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[17] The context of this statement in *Weyerhaeuser* was our treatment of the stevedoring contractor's contention that the shipowner's conduct had been such as to preclude recovery for the stevedoring contractor's breach of warranty. The statement that the shipowner owed the stevedoring contractor certain duties did not identify the source of those duties, but our discussion of the subject was in terms of obligations imposed by law:

"the duties owing from petitioner [the shipowner] to Connolly [the longshoreman] were not identical with those from petitioner to respondent [the stevedoring contractor]. While the jury found petitioner 'guilty of some act of negligence,' that ultimate finding might have been predicated, *inter alia,* on a failure of petitioner to remove the shelter when the ship left New York, or a failure to correct or warn respondent of a latent dangerous condition known to petitioner when respondent began the Boston unloading. Likewise, the finding might have been predicated on a failure of petitioner during the five days in Boston to inspect the shelter, detect and correct the unsafe condition. Although any of these possibilities could provide Connolly a basis of recovery, at least the latter would not, under *Ryan,* prevent recovery by petitioner in the third-party action." 355 U. S., at 568.

[18] The Federal District Court for the Southern District of California has held that the shipowner owes the stevedoring contractor at least the following obligations:

"(1) to exercise ordinary care under the circumstances to place the ship on which the stevedoring work is to be done, and the equipment and appliances aboard ship, in such condition that an expert and experienced stevedoring contractor, mindful of the dangers he should reasonably expect to encounter, arising from the hazards of the ship's service or otherwise, will be able by the exercise of ordinary time law does impose on the shipowner a duty to the stevedoring contractor of due care under the circumstances, and does recognize a direct action in tort against the shipowner to recover the amount of compensation payments occasioned by the latter's negligence.

This holding is in no wise a departure from our decision in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* 342 U. S. 282, 285, that we would not "fashion

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care under the circumstances to load or discharge the cargo, as the case may be, in a workmanlike manner and with reasonable safety to persons and property; and (2) to give the stevedoring contractor reasonable warning of the existence of any latent or hidden danger which has not been remedied and is not usually encountered or reasonably to be expected by an expert and experienced stevedoring company in the performance of the stevedoring work aboard the ship, if the shipowner actually knows or, in the exercise of ordinary care under the circumstances, should know of the existence of such danger, and the danger is one which the shipowner should reasonably expect a stevedoring contractor to encounter in the performance of the stevedoring contract." *Hugev* v. *Dampskisaktieselskabet International,* 170 F. Supp. 601, 610–611, aff'd *sub nom. Metropolitan Stevedore Co.* v. *Dampskisaktieselskabet International,* 274 F. 2d 875, cert. denied, 363 U. S. 803.

While the court identified these obligations as implied in fact from the stevedoring contract, it indicated that they also constituted the "duty of ordinary care imposed by law toward 'persons rightfully transacting business on ships.'" 170 F. Supp., at 610.

In the case of *Mickle* v. *The Henriette Wilhelmine Schulte,* 188 F. Supp. 77, 80, the District Court for the Northern District of California, while rejecting the argument that such obligations were contractual, agreed that the occupier of a ship

"owes certain duties of care to a business invitee, especially to an independent contractor, such as a stevedore company, which comes onto the premises to perform services, 2 Harper & James, The Law of Torts, Section 27.12 (1956), including the duty not to cause injury by negligent activity, 2 Restatement of Torts, Section 341; the duty to warn of latent perils actually known to the occupier, Prosser on Torts, 453 (1955); and the duty to inspect the premises to discover dangerous conditions. 2 Restatement of Torts, Section 343. See generally Prosser, supra, 452–62."

new judicial rules of contribution" between the shipowner and the stevedoring contractor as joint tortfeasors. Marine Terminals is not seeking contribution. It is not asking Burnside to share responsibility for their joint negligence with respect to McNeill. Rather the counterclaim seeks recovery of the full amount of Marine Terminals' liability under the Act to McNeill's representative; and it is founded not on Burnside's wrong to McNeill but on its independent wrong to Marine Terminals.

We further note that at this stage of the case it must be assumed that Marine Terminals was faultless *vis-à-vis* Burnside, for the claim that Marine Terminals breached its *Ryan* warranty of workmanlike service has not yet been adjudicated and is not before us. We decide nothing today with respect to the interaction between the shipowner's breach of warranty claim and the stevedoring contractor's tort claim. Marine Terminals has charged Burnside with negligence not as a defense to the latter's *Ryan* claim but in a counterclaim for damages, and we have considered that claim without regard to the implications of the shipowner's countervailing cause of action. Our holding is perforce limited to a rejection of Burnside's argument that "a shipowner's tortious conduct may be used as a shield, but not as a sword."

IV.

In holding that the stevedoring contractor has a direct action in tort, we do not preclude the possibility of a direct action under some other theory. Marine Terminals argues in this case, for example, that just as a stevedoring contractor impliedly warrants to a shipowner under *Ryan* that it will perform the stevedoring services in a workmanlike manner, so also there are reciprocal contractual warranties running from the shipowner to the stevedoring contractor.[19] Burnside counters with the observation that the stevedoring contract in this case is between Marine Terminals and its affiliate Federal Commerce, the time charterer, and that there is therefore no privity of contract between Marine Terminals and Burnside. Because the record before us contains neither the contract for stevedoring services nor the charter agreement, we cannot now assess these arguments. We do not know, for instance, whether any provisions of the time charter contain express or implied warranties which would inure to the benefit of Marine Terminals as stevedoring contractor.[20]

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[19] Such reciprocal contractual warranties were recognized in *Ryan,* Marine Terminals argues, by the Court's statement that "the *stevedoring contractor* . . . has received a contractual *quid pro quo* from the shipowner for assuming responsibility for the proper performance of all of the latter's stevedoring requirements . . . ." 350 U. S., at 129, n. 3. (Emphasis in original.) Other courts have most often dealt with the shipowner's duties only in the context of a stevedoring contractor's *defense* to a shipowner's claim for breach of *Ryan* warranties. See, *e. g., D/S Ove Skou* v. *Hebert,* 365 F. 2d 341; *T. Smith & Son* v. *Skibs A/S Hassel,* 362 F. 2d 745; *Albanese* v. *N. V. Nederl. Amerik Stoomv. Maats.,* 346 F. 2d 481, rev'd on other grounds, 382 U. S. 283; *Misurella* v. *Isthmian Lines, Inc.,* 328 F. 2d 40; *Pettus* v. *Grace Line, Inc.,* 305 F. 2d 151; *Drago* v. *A/S Inger,* 305 F. 2d 139, cert. denied, 371 U. S. 925; *Calmar S. S. Corp.* v. *Nacirema Operating Co.,* 266 F. 2d 79, cert. denied, 361 U. S. 816. They have on occasion, however, stated or intimated that the shipowner makes certain affirmative warranties to the stevedoring contractor whose breach would support an action for damages. See, *e. g., The No. 34,* 25 F. 2d 602; *Pettus* v. *Grace Line, Inc.,* 305 F. 2d 151, 155 (dissenting opinion of Judge Clark); *Cusumano* v. *Wilhelmsen,* 267 F. Supp. 164; *Ring* v. *Motor Vessel Cape Clear,* 226 F. Supp. 709. See also *Mowbray* v. *Merryweather,* [1895] 2 Q. B. 640. See generally Proudfoot, "The Tar Baby": Maritime Personal-Injury Indemnity Actions, 20 Stan. L. Rev. 423, 442-445 (1968).

[20] The stevedoring contractor's warranty of workmanlike service under *Ryan* extends to the shipowner even in the absence of con-

Marine Terminals has also argued that, aside from any express or implied-in-fact contract, it has a quasi-contractual right of indemnity for the liability which it incurred under the Act on account of the shipowner's wrong. This right, which was evidently recognized by the District Court,[21] is said not to stem solely from the pre-existing contractual relationship between the parties, but to be conferred by law in order to place the liability where it justly belongs.[22] As one court has described it,

> "admiralty courts have recognized a right to indemnity, as distinguished from contribution, in a person who has responded in damages for a loss caused by the wrong of another. This right has been recognized in two general classes of cases: those in which the person seeking indemnification was without fault; and those in which such person was passively negligent, but the primary cause of the loss was the active negligence of another." [23]

Recovery can be based on this concept, Marine Terminals contends, because Burnside's conduct was either solely or primarily responsible for McNeill's death.

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tractual privity between the parties. *Waterman S. S. Corp.* v. *Dugan & McNamara, Inc.*, 364 U. S. 421; *Crumady* v. *The Joachim Hendrik Fisser*, 358 U. S. 423. For the suggestion that the stevedoring contractor may be the beneficiary of certain of the shipowner's obligations under the charter agreement, see *Drago* v. *A/S Inger*, 305 F. 2d 139, 143.

[21] See *supra*, at 410–411.

[22] This Court has recognized the objective under the Compensation Act of "placing the burden ultimately on the company whose default caused the injury." *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U. S. 315, 324. And see *Reed* v. *The Yaka*, 373 U. S. 410, 414.

[23] *Davis* v. *American President Lines*, 106 F. Supp. 729, 730. For other decisions recognizing such a quasi-contractual right of indemnity under federal maritime law, see, *e. g.*, *Parenzan* v. *Iino Kaiun Kabushiki Kaisya*, 251 F. 2d 928, cert. denied, *sub nom.*

We express no opinion on the validity of this indemnity theory or its application to this case, but hold only that Marine Terminals is not foreclosed by any decision of this Court from raising it in the District Court. We have cautioned that "in the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate," *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, 569.[24] But that proscription in terms applied only "in the area of contractual indemnity" under *Ryan*. In *Ryan* itself we specifically did "not meet the question of a noncontractual right of indemnity or of the relation of the Compensation Act to such a right." 350 U. S., at 133.[25] By leaving open the question of such an indemnity action by the shipowner against the stevedoring contractor, *a fortiori* we did not decide anything with respect to such an action by the stevedoring contractor against the shipowner.[26]

International Terminal Operating Co. v. *Iino Kauin Kaisha*, 356 U. S. 939; *American President Lines, Ltd.* v. *Marine Terminals Corp.*, 234 F. 2d 753, cert. denied, 352 U. S. 926; *Berti* v. *Compagnie de Navigation Cyprien Fabre*, 213 F. 2d 397; *States S. S. Co.* v. *Rothschild Int'l Stevedoring Co.*, 205 F. 2d 253; *United States* v. *Rothschild Int'l Stevedoring Co.*, 183 F. 2d 181; *Standard Oil Co.* v. *Robins Dry Dock & Repair Co.*, 32 F. 2d 182; *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314, 107 N. E. 2d 463.

[24] See also *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U. S. 315, 320.

[25] See also 350 U. S., at 132, n. 6. The *Ryan* opinion also recognized the difference between, and treated separately, the noncontractual right of indemnity and the claim for contribution from a joint tortfeasor. *Id.*, at 133.

[26] Some have thought that the exclusivity of the employer's statutory liability to the employee would prevent the shipowner from asserting a right of indemnity against the stevedoring contractor based on the latter's wrong to the employee. See, *e. g.*, *Ryan, supra*, at 142 (BLACK, J., dissenting); *Brown* v. *American-Hawaiian S. S. Co.*, 211 F. 2d 16; *Slattery* v. *Marra Bros.*, 186 F. 2d

Because, as we hold today, § 33 of the Longshoremen's and Harbor Workers' Compensation Act is not the exclusive source of the stevedoring contractor's remedies against the shipowner, and the former may have a cause of action in tort for the compensation payments caused by the shipowner's negligence, we reverse the judgment of the Court of Appeals and remand this case to the District Court for further proceedings consistent with this opinion.

It is so ordered.

134, cert. denied, 341 U. S. 915. But there is no such barrier, of course, to a direct action by the stevedoring contractor against the shipowner.

SCOFIELD ET AL. v. NATIONAL LABOR RELATIONS BOARD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 273. Argued January 14, 1969.—Decided April 1, 1969.

Petitioners, union members employed by the Wisconsin Motor Corp. on a piecework basis, were each fined and suspended by their union (without endangering their job retention) for violating a union rule relating to production ceilings. The union and employer had bargained over the ceiling level but the collective bargaining agreement does not foreclose the employer's paying employees for work performed over the ceiling. Petitioners refused to pay the fines, the union brought suit in a state court to collect them, and petitioners then initiated charges before the National Labor Relations Board (NLRB), arguing that union enforcement of the rule through collection of fines was an unfair labor practice. The NLRB found no violation of the National Labor Relations Act (NLRA) and the Court of Appeals upheld its ruling. *Held:*

1. Petition for certiorari in this case, filed within 90 days of the decree but not of the opinion, where no notice of entry of any judgment at time of the opinion had been given petitioners, was timely. P. 427.

2. Section 8 (b)(1) of the NLRA permits a union to enforce a properly adopted rule which reflects a legitimate union interest, impairs no statutory labor policy, and is reasonably enforced against union members who are free to leave the union and escape the rule, while maintaining job security under the union shop clause by paying dues. *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175. Pp. 428–430.

3. Arguments that the union rule in this case contravened a statutory labor policy were inadequate here. That rule did not demonstrably impede the collective bargaining process, cause a breach of the collective bargaining agreement, establish featherbedding within the meaning of the statute, induce discrimination by the employer against any class of employees, or represent any dereliction by the union of its duty of fair representation, and in view of the acceptable manner of its enforcement by reasonable

fines to vindicate a proper union concern it does not constitute the restraint or coercion prohibited by § 8 (b)(1)(A). Pp. 430-436.

393 F. 2d 49, affirmed.

James Urdan argued the cause and filed a brief for petitioners.

Norton J. Come argued the cause for respondent National Labor Relations Board. With him on the brief were *Solicitor General Griswold, Arnold Ordman,* and *Dominick L. Manoli. John Silard* argued the cause for respondent International Union, United Automobile Workers. With him on the brief were *Joseph L. Rauh, Jr.*, and *Stephen I. Schlossberg.*

Walter S. Davis filed a brief for the Wisconsin Manufacturers Assn. et al. as *amici curiae* urging reversal.

MR. JUSTICE WHITE delivered the opinion of the Court.

Half the production employees of the Wisconsin Motor Corporation are paid on a piecework or incentive basis. They and the other employees are represented by respondent union, which has had contractual relations with the company since 1937.[1] In 1938 the union initiated a ceiling on the production for which its members would accept immediate piecework pay. This was done at first by gentlemen's agreement among the members, but since 1944 by union rule enforceable by fines and expulsion. As the rule functions now, members may produce as much as they like each day, but may only draw pay up to the ceiling rate. The additional production is "banked" by the company; that is, wages due for it are retained by the company and paid out to the employee for days on which the production ceiling has not been reached because of machine breakdown or for some other reason. If the member demands to be paid in full each pay period over the ceiling rate the company will comply, but the union assesses a fine of $1 for each violation, and in cases of repeated violation may fine the member up to $100 for "conduct unbecoming a union member." Failure to pay the fine may lead to expulsion. As the trial examiner found, the company's complaint is not and cannot be that "the employee, for the pay he receives, has not given the requisite *quid pro quo* in production." 145 N. L. R. B. 1097, 1120. Rather, the question is the extent to which the group will forgo for pay the rest periods it has bargained for, and the discipline which the union may invoke to achieve unity toward this end which, the trial examiner found, was "manifestly a matter affecting the interest of the group and in which its collective bargaining strength hinges upon the cooperation of its individual components." *Ibid.*

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[1] There is a union security clause in the current contract, giving each employee, after a 30-day waiting period, the option of becoming and remaining a member in good standing of the union, or of declining membership but paying the union a "service fee."

The collective bargaining contract between employer and union defines a "machine rate" of hourly pay guaranteed to the employees. The piecework rate, as defined by the contract, is set at such a level that "the average competent operator working at a reasonable pace [as determined by a time study] shall earn not less than the machine rate of his assigned task."[2] Allowances are made in the time study for setting up machinery, cleaning tools, fatigue, and personal needs. By ignoring these allowances or by speed and efficiency it is possible for an industrious employee to produce faster than the machine rate. If he does so, he is entitled to additional pay. Union members, however, are subject to the banking procedures imposed by the union rule.

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[2] There is also a "day rate," lower than the machine rate, which applies to periods in which the incentive worker has not been producing, or has produced scrap, through no fault of the company's. That rate is of no concern here.

The margin between the "machine" rate set by the contract and the ceiling rate set by the union was 10¢ per hour in 1944. As a result of collective bargaining between company and union over both the machine and ceiling rates, the margin has been increased to between 45¢ and 50¢, depending on the skill level of the job. The company has regularly urged the union to abandon the ceiling and has never agreed to refuse employees immediate pay for work done over the ceiling. However, the parties have bargained over the ceiling rate and the company has extracted from the union promises to increase the ceiling rate. The company opens its work records to the union to permit it to check compliance with the ceiling; pays union stewards for time spent in this checking activity as legitimate union business; and banks money for union members complying with the rule. The ceiling rate is also used in computing piece rate increases and in settling grievances.

This case arose in 1961 when a random card check by the union showed that petitioners, among other union members, had exceeded the ceiling. The union membership imposed fines of $50 to $100, and a year's suspension from the union. Petitioners refused to pay the fines, and the union brought suit in state court to collect the fines as a matter of local contract law.[3] Petitioners then initiated charges before the National Labor Relations Board, arguing that union enforcement of its rule through the collection of fines was an unfair labor practice. Petitioners asserted that their right to refrain from "concerted activities," National Labor Relations Act, § 7, 49 Stat. 452, as amended, 29 U. S. C. § 157, was impaired by the union's effort to "restrain or coerce" them, in violation of NLRA, § 8 (b)(1)(A). The trial examiner, after extensive findings, concluded that there was no violation of the Act, and his findings and recommendations were adopted by the Board, 145 N. L. R. B. 1097 (1964), whose order was enforced by the Court of Appeals for the Seventh Circuit, 393 F. 2d 49 (1968). We affirm.

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[3] Unless the rule or its enforcement impinges on some policy of the federal labor law, the regulation of the relationship between union and employee is a contractual matter governed by local law. As the trial examiner put it in this case, the Board "never intended . . . to suggest that the disciplinary action[s] in enforcement of [union] rules . . . were affirmatively protected under the Act, as opposed to merely being not violations thereof." It is thus a "federally unentered enclave" open to state law. 145 N. L. R. B., at 1133.

I.

We are met at the outset with the contention that the petition for certiorari was untimely filed. In civil suits certiorari must be applied for "within ninety days after the entry of [the] judgment or decree" of which review is sought. 28 U. S. C. § 2101 (c). In this case an opinion of March 5, 1968, concluded that "upon presentation, an appropriate decree will be entered." A decree was in fact entered on April 16, 1968. The petition for certiorari was docketed here on July 6, 1968, within 90 days of the decree but not of the opinion.

In our view, the petition for certiorari was timely filed. Petitioners here received a copy of the March 5 opinion, but were given no notice of any entry of judgment on that date, as would be required by Rule 36 of the new Federal Rules of Appellate Procedure, effective July 1, 1968. Since no notice was given and it could not have been clear to petitioners whether there was a March 5 judgment or not we hold, without abandoning the standard that a "judgment for our purposes is final when the issues are adjudged" and settled with finality, *Market Street R. Co.* v. *Railroad Commission,* 324 U. S. 548, 551–552 (1945); *FTC* v. *Minneapolis-Honeywell Regulator Co.,* 344 U. S. 206, 212 (1952), that in this case the relevant date is that of the entry of the decree. Cf. *Rubber Co.* v. *Goodyear,* 6 Wall. 153, 156 (1868).

II.

Section 8 (b)(1) makes it an unfair labor practice to "restrain or coerce (A) employees in the exercise of the rights guaranteed in [§ 7]: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . ."

Based on the legislative history of the section, including its proviso, the Court in *NLRB* v. *Allis-Chalmers Mfg. Co.,* 388 U. S. 175, 195 (1967), distinguished between internal and external enforcement of union rules and held that "Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status." A union rule, duly adopted and not the arbitrary fiat of a union officer, forbidding the crossing of a picket line during a strike was therefore enforceable against voluntary union members by expulsion or a reasonable fine. The Court thus essentially accepted the position of the National Labor Relations Board dating from *Minneapolis Star & Tribune Co.,* 109 N. L. R. B. 727 (1954) where the Board also distinguished internal from external enforcement [4] in holding that a union could fine a member for his failure to take part in picketing during a strike but that the same rule could not be enforced by causing the employer to exclude him from the work force or by affecting his seniority without triggering violations of §§ 8 (b)(1), 8 (b)(2), 8 (a)(1), 8 (a)(2), and 8 (a)(3). These sections form a web, of which § 8 (b)(1)(A) is only a strand, preventing the union from inducing the employer to use the emoluments of the job to enforce the union's rules.[5]

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[4] The Board has long held that § 8 (b)(1)(A)'s legislative history requires a narrow construction which nevertheless proscribes unacceptable methods of union coercion, such as physical violence to induce employees to join the union or to join in a strike. *In re Maritime Union,* 78 N. L. R. B. 971, enforced, 175 F. 2d 686 (C. A. 2d Cir. 1949).

This interpretation of § 8 (b)(1), as the Court explained in *Allis-Chalmers,* 388 U. S., at 193–195, was reinforced by the Landrum-Griffin Act of 1959 which, although it dealt with the internal affairs of unions, including the procedures for imposing fines or expulsion, did not purport to overturn or modify the Board's interpretation of § 8 (b)(1).[6] And it was this interpretation which the Board followed in *Allis-Chalmers* and in the case now before us.

Although the Board's construction of the section emphasizes the sanction imposed, rather than the rule itself, and does not involve the Board in judging the fairness or wisdom of particular union rules, it has become clear that if the rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating § 8 (b)(1). In both

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[5] The Court has held that the "policy of the Act is to insulate employees' jobs from their organizational rights." *Radio Officers' Union* v. *National Labor Relations Board,* 347 U. S. 17, 40 (1954). As an employee, he may be a "good, bad, or indifferent" member so long as he meets the financial obligations of the union security contract. Thus the Board has found an unfair labor practice by union and employer where an employee was discharged for violation of a union rule limiting production. *Printz Leather Co.,* 94 N. L. R. B. 1312 (1951). But as a union member, so long as he chooses to remain one, he is subject to union discipline.

[6] As part of the bill of rights of union members, the Landrum-Griffin Act guaranteed freedom of speech and assembly "*Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations." Pub. L. 86–257, Tit. I, § 101 (a)(2), 73 Stat. 522, 29 U. S. C. § 411 (a)(2).

Skura[7] and *Marine Workers*,[8] the Board was concerned with union rules requiring a member to exhaust union remedies before filing an unfair labor practice charge with the Board. That rule, in the Board's view, frustrated the enforcement scheme established by the statute and the union would commit an unfair labor practice by fining or expelling members who violated the rule.

The *Marine Workers* case came here[9] and the result reached by the Board was sustained, the Court agreeing that the rule in question was contrary to the plain policy of the Act to keep employees completely free from coercion against making complaints to the Board. Frustrating this policy was beyond the legitimate interest of the labor organization, at least where the member's complaint concerned conduct of the employer as well as the union.

Under this dual approach, § 8 (b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule. This view of the statute must be applied here.

III.

In the case at hand, there is no showing in the record that the fines were unreasonable or the mere fiat of a union leader, or that the membership of petitioners in the union was involuntary. Moreover, the enforcement of the rule was not carried out through means unacceptable in themselves, such as violence or employer discrimination. It was enforced solely through the internal technique of union fines, collected by threat of expulsion or judicial action. The inquiry must therefore focus on the legitimacy of the union interest vindicated by the rule and the extent to which any policy of the Act may be violated by the union-imposed production ceiling.

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[7] *Local 138, International Union of Operating Engineers*, 148 N. L. R. B. 679 (1964).

[8] *Industrial Union of Marine & Shipbuilding Workers of America*, 159 N. L. R. B. 1065 (1966).

[9] *National Labor Relations Board* v. *Industrial Union of Marine & Shipbuilding Workers*, 391 U. S. 418 (1968).

As both the trial examiner and the Court of Appeals noted, union opposition to unlimited piecework pay systems is historic. Union apprehension, not without foundation, is that such systems will drive up employee productivity and in turn create pressures to lower the piecework rate so that at the new, higher level of output employees are earning little more than they did before. The fear is that the competitive pressure generated will endanger workers' health, foment jealousies, and reduce the work force. In addition, the findings of the trial examiner were that the ceiling served as a yardstick for the settlement of job allowance grievances, that it has played an important role in negotiating the minimum hourly rate and that it is the standard for "factoring" the hourly rate raises into the piecework rate. The view of the trial examiner was that "in terms of a union's traditional function of trying to serve the economic interests of the group as a whole, the Union has a very real, immediate, and direct interest in it." 145 N. L. R. B., at 1135.

It is doubtless true that the union rule in question here affects the interests of all three participants in the labor-management relation: employer, employee, and union.[10]

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[10] The company prefers to employ the minimum number of the most energetic men available; a piecework pay scheme without a ceiling could help it obtain its objective of winnowing the men and reducing their piecework rate. Each employee, as well, has an interest in the ceiling. A slow worker would prefer a low ceiling to protect himself against invidious comparison with faster workers and a possible reduction of the work force beginning with him. A fast worker may prefer to earn as much as possible in a day and so

Although the enforcement of the rule is handled as an internal union matter, the rule has and was intended to have an impact beyond the confines of the union organization. But as *Allis-Chalmers* and *Marine Workers* made clear, it does not follow from this that the enforcement of the rule violates § 8 (b)(1)(A), unless some impairment of a statutory labor policy can be shown.

The principal contention of the petitioners is that the rule impedes collective bargaining, a process nurtured in many ways by the Act. But surely this is not the case here. The union has never denied that the ceiling is a bargainable issue. It has never refused to bargain about it as far as this record shows. Indeed, the union has at various times agreed to raise its ceiling in return for an increase in the piece rate, and the ceiling has been regularly used to compute the new piece rate. In light of this bargaining history it can hardly be said that the union rule has removed this issue from the bargaining table. The company has repeatedly sought an agreement eliminating the piecework ceiling, an agreement which, had it been obtained, unquestionably would have been violated by the union rule. But the company could not attain this. Although, like the union, it could have pressed the point to impasse, *Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* 379 U. S. 203, 209–215 (1964), followed by strike or lockout, it has never done so. Instead, it has signed contracts recognizing the

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desire a high ceiling or none at all. But all workers have an interest in maintaining a ceiling to the extent that it is necessary to prevent reductions in the piecework rate. The employer and the union (representing the group) may seek to vindicate their interests in bargaining. The individual member may express his interest within the union councils in determining what the group position shall be—and here the trial examiner found that the employees overwhelmingly approved of the ceiling—or through exercising the option of withdrawing from the union.

ceiling, has tolerated it, and has cooperated in its administration by honoring requests by employees to bank their pay for over-ceiling work. We discern no basis in the statutory policy encouraging collective bargaining for giving the employer a better bargain than he has been able to strike at the bargaining table.[11]

Nor does the union ceiling itself or compliance with it by union members violate the collective contract. The company and the union have agreed to an incentive pay scale, but they have also established a guaranteed minimum or machine rate considerably below the union ceiling and defined in the contract as the rate of production of an average, efficient worker. The contract therefore leaves in the hands of the employee the option of taking full advantage of his allowances, performing only as an average employee and not reaching even the ceiling rate. At least there is nothing before us to indicate that the company disciplines individuals who work at only the machine rate or individuals who produce more but who choose not to exceed the union ceiling. The same decision can be made collectively by the union. Although it has agreed in the contract to a pay scale for production in excess of ceiling, that fact in the context of this case does not support an inference that the union has agreed not to impose the ceiling or that its action in announcing one is somehow contrary to the contract. And if neither union nor member is in breach of contract for establishing and adhering to the ceiling, it is equally clear that the rule neither causes nor invites a contract violation by the employer who stands ready to pay an employee for his over-ceiling production or to bank it at his request.

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[11] The trial examiner suggests that if the ceilings did not exist, the management might well invent them to serve its own purposes: maintaining careful work standards and a low scrap rate, and permitting the prediction of production output. 145 N. L. R. B., at 1119–1120.

Petitioners purport to characterize the union rule as featherbedding, but it is hard to square this with the collective agreement that an average, efficient employee produces at a "machine" rate substantially below the ceiling. Beyond that, however, Congress has addressed itself specifically to the problem of featherbedding in § 8 (b)(6), making it an unfair labor practice "to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed . . . ." 61 Stat. 142, 29 U. S. C. § 158 (b)(6). This narrow prohibition was enacted partly because the Congress found it difficult to define with more particularity just where the area between shiftlessness and overwork should lie.[12] Since Congress has addressed itself to the problem specifically and left a broad area for private negotiation, there is no present occasion for the courts to interfere with private decision. Indeed, there is no claim before us that the rule violates § 8 (b)(6). If the company wants to require more work of its employees, let it strike a better bargain. The labor laws as presently drawn will not do so for it.

This leaves the possible argument that because the union has not successfully bargained for a contractual ceiling, it may not impose one on its own members, for doing so will discriminate between members and those others who are free to earn as much as the contract permits. All members of the bargaining unit, however, have the same contractual rights. In dealing with the employer as bargaining agent, the union has accorded all employees uniform treatment. If members are prevented from taking advantage of their contractual rights bargained for all employees it is because they have chosen to become and remain union members. In *Allis-Chalmers,* the union members were subject to the discipline of an internal rule which strengthened the union's hand in bargaining and in this respect benefited both the members who obeyed the rule and the nonmembers who did not. The same is true here, and the price of obeying the rule is not as high as in *Allis-Chalmers.* There the member could be replaced for his refusal to report to work during a strike; here he need simply limit his production and suffer whatever consequences that conduct may entail. If a member chooses not to engage in this concerted activity and is unable to prevail on the other members to change the rule, then he may leave the union and obtain whatever benefits in job advancement and extra pay may result from extra work, at the same time enjoying the protection from competition, the high piece rate, and the job security which compliance with the union rule by union members tends to promote.

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[12] Senator Taft, cosponsor of the bill and Chairman of the Senate Committee on Labor and Public Welfare, stated on the floor of the Senate that to do more "would require a practical application of the law by the courts in hundreds of different industries, and a determination of facts which it seemed to me would be almost impossible." By contrast, he said, "we did accept one provision" which "seemed to be a fairly clear case, easy to determine" and narrow. 93 Cong. Rec. 6441.

That the choice to remain a member results in differences between union members and other employees raises no serious issue under § 8 (b)(2) and § 8 (a)(3) of the Act, because the union has not induced the employer to discriminate against the member but has merely forbidden the member to take advantage of benefits which the employer stands willing to confer. Those sections are not aimed at completely internal union discipline of union members, even though the discipline may result in the member's refusal to accept work offered by the employer. *Allis-Chalmers* makes this quite clear.

The union rule here left the collective bargaining process unimpaired, breached no collective contract, required no pay for unperformed services, induced no discrimination by the employer against any class of employees, and represents no dereliction by the union of its duty of fair representation. In light of this, and the acceptable manner in which the rule was enforced, vindicating a legitimate union interest, it is impossible to say that it contravened any policy of the Act.

We affirm, holding that the union rule is valid and that its enforcement by reasonable fines does not constitute the restraint or coercion proscribed by § 8 (b)(1)(A).

Affirmed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, dissenting.

Because the union members collected from their employer extra pay for piecework production in excess of that agreed upon by the union and the company, the union has tried the members, fined them, and suspended them from the union for one year. Section 8 (b)(1) of the National Labor Relations Act makes it an unfair labor practice for a union to "restrain or coerce" employees in the exercise of their right under § 7 to refrain from any or all concerted activities. In this case the National Labor Relations Board held that the union did not commit an unfair labor practice in coercing employees through fines and suspensions into refusing to engage in this concerted activity. I dissent from affirming this order of the Board for the reasons set out at length in my dissenting opinion in *NLRB* v. *Allis-Chalmers Mfg. Co.,* 388 U. S. 175, 199 (1967).

CARDINALE v. LOUISIANA.

CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

No. 76. Argued February 24, 1969.—Decided April 1, 1969.

Since petitioner's contention that a Louisiana statute requiring that confessions be admitted into evidence in their entirety notwithstanding their inclusion of irrelevant and prejudicial material is unconstitutional—the sole federal question argued in this Court—was not raised, preserved, or passed on in the state courts, the writ of certiorari is dismissed for want of jurisdiction, as this Court will not decide federal questions raised here for the first time on review of state court decisions. Pp. 438–439.

251 La. 827, 206 So. 2d 510, certiorari dismissed for want of jurisdiction.

Nathan Greenberg argued the cause and filed a brief for petitioner.

Preston H. Hufft argued the cause for respondent. With him on the brief were *Jack P. F. Gremillion,* Attorney General of Louisiana, *William P. Schuler,* Second Assistant Attorney General, and *Leander H. Perez, Jr.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioner brutally murdered a woman near New Orleans, and then fled the State. He had been seen with his victim, and a warrant was issued for his arrest. In the course of his flight petitioner came to Tucson, Arizona, where he decided to surrender. He flagged down a police car and, after an interruption by the police to warn him that he need not speak, that his speech might be used against him, and that he had a right to contact an attorney, was taken to the station house where he poured out a confession. His confession was introduced in its entirety in the subsequent trial for murder in which petitioner was convicted and sentenced to death.

Petitioner does not now contend that his confession was involuntary or that his admission of guilt to the Tucson police was inadmissible in evidence. He objects solely to the admission of those parts of his confession which he argues were both irrelevant and prejudicial in his trial for murder. A Louisiana statute requires that confessions must be admitted in their entirety, La. Rev. Stat. § 15:450, and petitioner contends that this is unconstitutional.

Although certiorari was granted to consider this question, the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell* v. *Randell,* 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings* v. *Norwood's Lessee,* 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. "If both of these do not appear on the record, the appellate jurisdiction fails." 10 Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the *Crowell* opinion, *Miller* v. *Nicholls,* 4 Wheat. 311, 315 (1819), and since, *e. g., Safeway Stores, Inc.* v. *Oklahoma Retail Grocers Assn., Inc.,* 360 U. S. 334, 342, n. 7 (1959); *State Farm Mutual Automobile Ins. Co.* v. *Duel,* 324 U. S. 154, 160–163 (1945); *McGoldrick* v. *Compagnie Generale Transatlantique,* 309 U. S. 430, 434–435 (1940); *Whitney* v. *California,* 274 U. S. 357, 362–363 (1927); *Dewey* v. *Des Moines,* 173 U. S. 193, 197–201 (1899); *Murdock* v. *City of Memphis,* 20 Wall. 590 (1875).

In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U. S. C. § 1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor* v. *Ohio,* 385 U. S. 92 (1966), they should be given the first opportunity to consider them.

In view of the petitioner's admitted failure to raise the issue he presents here in any way below, the failure of the state court to pass on this issue, the desirability of giving the State the first opportunity to apply its statute on an adequate record, and the fact that a federal habeas remedy may remain if no state procedure for raising the issue is available to petitioner, the writ is dismissed for want of jurisdiction.

It is so ordered.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE FORTAS concur in the dismissal of the writ, believing it to have been improvidently granted.

FOSTER *v.* CALIFORNIA.

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT.

No. 47. Argued November 19, 1968.—Decided April 1, 1969.

Petitioner was convicted of robbery of a Western Union office. The office manager viewed a police station lineup of three men, petitioner (who is almost six feet tall and who was wearing a leather jacket similar to one worn by the robber) and two much shorter men. The manager could not positively identify petitioner as the robber and asked for and was given a chance to speak to him. Petitioner was brought into an office alone and seated across from the manager at a table. The manager was still uncertain. About a week later he viewed another lineup, of petitioner and four different men. This time the manager was "convinced" petitioner was the robber. He testified to the lineup identifications at the trial and repeated his identification in the courtroom. *Held:*

1. Although the rule that an accused must be given the opportunity to be represented by counsel at a lineup does not apply to lineups conducted prior to June 12, 1967, *Stovall* v. *Denno,* 388 U. S. 293, the conduct of identification procedures must not be "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to be a denial of due process of law. *Id.,* at 302. P. 442.

2. The suggestive elements in the repeated confrontations the police arranged between the manager and petitioner so undermined the reliability of the eyewitness identification as to violate due process. Pp. 442–443.

3. The question of whether the error was harmless under *Chapman* v. *California,* 386 U. S. 18, should be determined in the first instance by the California courts. P. 444.

Reversed and remanded.

Kenneth L. Maddy, by appointment of the Court, 391 U. S. 902, argued the cause and filed briefs for petitioner.

Doris H. Maier, Assistant Attorney General of California, argued the cause for respondent. With her on the brief were *Thomas C. Lynch,* Attorney General, and *Charles P. Just,* Deputy Attorney General.

MR. JUSTICE FORTAS delivered the opinion of the Court.

Petitioner was charged by information with the armed robbery of a Western Union office in violation of California Penal Code § 211a. The day after the robbery one of the robbers, Clay, surrendered to the police and implicated Foster and Grice. Allegedly, Foster and Clay had entered the office while Grice waited in a car. Foster and Grice were tried together. Grice was acquitted. Foster was convicted. The California District Court of Appeal affirmed the conviction; the State Supreme Court denied review. We granted certiorari, limited to the question whether the conduct of the police lineup resulted in a violation of petitioner's constitutional rights. 390 U. S. 994 (1968).

Except for the robbers themselves, the only witness to the crime was Joseph David, the late-night manager of the Western Union office. After Foster had been arrested, David was called to the police station to view a lineup. There were three men in the lineup. One was petitioner. He is a tall man—close to six feet in height. The other two men were short—five feet, five or six inches. Petitioner wore a leather jacket which David said was similar to the one he had seen underneath the coveralls worn by the robber. After seeing this lineup, David could not positively identify petitioner as the robber. He "thought" he was the man, but he was not sure. David then asked to speak to petitioner, and petitioner was brought into an office and sat across from David at a table. Except for prosecuting officials there was no one else in the room. Even after this one-to-one confrontation David still was uncertain whether petitioner was one of the robbers: "truthfully—I was not sure," he testified at trial. A week or 10 days later, the police arranged for David to view a second lineup. There were five men in that lineup. Petitioner was the only person in the second lineup who had appeared in the first lineup. This time David was "convinced" petitioner was the man.

At trial, David testified to his identification of petitioner in the lineups, as summarized above. He also repeated his identification of petitioner in the courtroom. The only other evidence against petitioner which concerned the particular robbery with which he was charged was the testimony of the alleged accomplice Clay.[1]

In *United States* v. *Wade,* 388 U. S. 218 (1967), and *Gilbert* v. *California,* 388 U. S. 263 (1967), this Court held that because of the possibility of unfairness to the accused in the way a lineup is conducted, a lineup is a "critical stage" in the prosecution, at which the accused must be given the opportunity to be represented by counsel. That holding does not, however, apply to petitioner's case, for the lineups in which he appeared occurred before June 12, 1967. *Stovall* v. *Denno,* 388 U. S. 293 (1967). But in declaring the rule of *Wade* and *Gilbert* to be applicable only to lineups conducted after those cases were decided, we recognized that, judged by the "totality of the circumstances," the conduct of identification procedures may be "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to be a denial of due process of law. *Id.,* at 302. See *Simmons* v. *United States,* 390 U. S. 377, 383 (1968); cf. P. Wall, Eye-Witness Identification in Criminal Cases; J. Frank & B. Frank, Not Guilty; 3 J. Wigmore, Evidence § 786*a* (3d ed. 1940); 4, *id.,* § 1130.

Judged by that standard, this case presents a compelling example of unfair lineup procedures.[2] In the first lineup arranged by the police, petitioner stood out from the other two men by the contrast of his height and by the fact that he was wearing a leather jacket similar to that worn by the robber. See *United States* v. *Wade, supra,* at 233. When this did not lead to positive identification, the police permitted a one-to-one confrontation between petitioner and the witness. This Court pointed out in *Stovall* that "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." 388 U. S., at 302. Even after this the witness' identification of petitioner was tentative. So some days later another lineup was arranged. Petitioner was the only person in this lineup who had also participated in the first lineup. See Wall, *supra,* at 64. This finally produced a definite identification.

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[1] California law requires that an accomplice's testimony be corroborated. California Penal Code § 1111. There was also evidence that Foster had been convicted for a similar robbery committed six years before.

[2] The reliability of properly admitted eyewitness identification, like the credibility of the other parts of the prosecution's case is a matter for the jury. But it is the teaching of *Wade, Gilbert,* and

The suggestive elements in this identification procedure made it all but inevitable that David would identify petitioner whether or not he was in fact "the man." In effect, the police repeatedly said to the witness, "*This* is the man." See *Biggers* v. *Tennessee,* 390 U. S. 404, 407 (dissenting opinion). This procedure so undermined the reliability of the eyewitness identification as to violate due process.

In a decision handed down since the Supreme Court of California declined to consider petitioner's case, it reversed a conviction because of the unfair makeup of a lineup. In that case, the California court said: "[W]e do no more than recognize . . . that unfairly constituted lineups have in the past too often brought about the conviction of the innocent." *People* v. *Caruso,* 68 Cal. 2d 183, 188, 436 P. 2d 336, 340 (1968). In the present case the pretrial confrontations clearly were so arranged as to make the resulting identifications virtually inevitable.

Stovall, supra, that in some cases the procedures leading to an eyewitness identification may be so defective as to make the identification constitutionally inadmissible as a matter of law.

The respondent invites us to hold that any error was harmless under *Chapman* v. *California,* 386 U. S. 18 (1967). We decline to rule upon this question in the first instance. Accordingly, the judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE WHITE, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART concur, being unwilling in this case to disagree with the jury on the weight of the evidence, would affirm the judgment.

MR. JUSTICE BLACK, dissenting.

The Court here directs the California courts to set aside petitioner Foster's conviction for armed robbery of the Western Union Telegraph Co. at Fresno, California. The night manager of the telegraph company testified before the court and jury that two men came into the office just after midnight, January 25, 1966, wrote a note telling him it was a holdup, put it under his face, and demanded money, flashed guns, took $531 and fled. The night manager identified Foster in the courtroom as one of the men, and he also related his identification of Foster in a lineup a week or so after the crime. The manager's evidence, which no witness disputed, was corroborated by the testimony of a man named Clay, who was Foster's accomplice in the robbery and who testified for the State. The testimony of these two eyewitnesses was also corroborated by proof that Foster and another person had committed a prior armed robbery of a Western Union office in another city six years before, when they appeared at the company's office, presented a note to an employee announcing their holdup, flashed a gun, and fled with company money. In this case Foster's attorney admitted conviction for the prior Western Union armed robbery.[1] The circumstances of the two robberies appear to have been practically indistinguishable. Such evidence that a particular person committed a prior crime has been almost universally accepted as relevant and admissible to prove that the same person was responsible for a later crime of the same nature.[2] A narration of these facts, falling from the lips of eyewitnesses, and not denied by other eyewitnesses, would be enough, I am convinced, to persuade nearly all lawyers and judges, unhesitatingly to say, "There was clearly enough evidence of guilt here for a jury to convict the defendant since, according to practice, and indeed constitutional command, the weight of evidence is for a jury, and not for judges." Nevertheless the Court in this case looks behind the evidence given by witnesses on the stand and decides that because of the circumstances under which one witness first identified the defendant as the criminal, the United States Constitution requires that the conviction be reversed. The Court, however, fails to spell out exactly what should happen to this defendant if there must be a retrial, and thus avoids the apparently distasteful task of specifying whether (1) at the new trial the jury would again be permitted to hear the eyewitness' testimony and the in-court identification, so long as he does not refer to the previous lineups, or (2) the eyewitness' "tainted" identification testimony must be entirely excluded, thus compelling Foster's acquittal. Objection to this ambiguity is the first of my reasons for dissent.

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[1] Counsel also admitted a prior felony conviction of assault with intent to commit rape, a circumstance relevant in California in connection with punishment.

[2] See *Spencer* v. *Texas,* 385 U. S. 554, 560–561 and n. 7 (1967); *State* v. *Chance,* 92 Ariz. 351, 377 P. 2d 197 (1962); *Nester* v. *State,* 75 Nev. 41, 334 P. 2d 524 (1959); *Mosley* v. *State,* 211 Ga. 611, 87 S. E. 2d 314 (1955); 2 J. Wigmore, Evidence § 416 (3d ed. 1940 and 1964 Supp.).

I.

The Court declares the judgment of conviction is reversed and the case remanded for further proceedings not inconsistent with this opinion. I am compelled to say that if I were the trial judge in this case I would not know how to proceed or how to decide whether the "error" in this case was harmless. Of course, when a confession is held to have been compelled, that confession must not be admitted to convict the defendant at all. But the situation in this case is not that simple. For the Court has in effect decided here that the officers of the law have so "arranged" lineups that the eyewitness to the robbery has been led to make an "irreparable mistaken identification." In other words, no one now or hereafter can believe his identification of Foster as the robber. Since he and the accomplice are the only eyewitnesses, and since, in order to convict, California law requires evidence of an accomplice to be corroborated, the Court's direction means, I suppose, that the trial judge here should dismiss the case.[3] The Court's dilemma, which leads to its ambiguous judgment as to the further disposition of this case, points, I think, to the irreparable harm done to the cause of justice by the Court's holding in this case.

II.

Far more fundamental, however, is my objection to the Court's basic holding that evidence can be ruled constitutionally inadmissible whenever it results from identification procedures that the Court considers to be " 'unnecessarily suggestive and conducive to irreparable mistaken identification.' "[4] One of the proudest achievements of this country's Founders was that they had eternally guaranteed a trial by jury in criminal cases, at least until the Constitution they wrote had been amended in the manner they prescribed. Only last year in *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), this Court emphatically decided, over strong dissents, that this constitutional right to trial by jury in criminal cases is applicable to the States. Of course it is an incontestable fact in our judicial history that the jury is the sole tribunal to weigh and determine facts. That means that the jury must, if we keep faith with the Constitution, be allowed to hear eyewitnesses and decide for itself whether it can recognize the truth and whether they are telling the truth. It means that the jury must be allowed to decide for itself whether the darkness of the night, the weakness of a witness' eyesight, or any other factor impaired the witness' ability to make an accurate identification. To take that power away from the jury is to rob it of the responsibility to perform the precise functions the Founders most wanted it to perform. And certainly a Constitution written to preserve this indispensable, unerodible core of our system for trying criminal cases would not have included, hidden among its provisions, a slumbering sleeper granting the judges license to destroy trial by jury in whole or in part.

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[3] The Court apparently means that the only other evidence against Foster in this case—his prior conviction for involvement in a crime of a similar type—is constitutionally admissible. See *Spencer* v. *Texas, supra*. But it may be doubtful whether this past conviction, although highly relevant to the question of guilt, could constitute corroboration of the accomplice's testimony, within the meaning of the California requirement.

This brings me to the constitutional theory relied upon by the Court to justify its invading the constitutional right of jury trial. The Court here holds that:

> "[J]udged by the 'totality of the circumstances,' the conduct of identification procedures may be 'so

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[4] *Ante,* at 442, quoting from *Stovall* v. *Denno,* 388 U. S. 293, 302 (1967).

> unnecessarily suggestive and conducive to irreparable mistaken identification' as to be a denial of due process of law. . . .
>
> "Judged by that standard, this case presents a compelling example of unfair lineup procedures." *Ante,* at 442.

I do not deny that the "totality of circumstances" can be considered to determine whether some specific constitutional prohibitions have been violated, such, for example, as the Fifth Amendment's command against compelling a witness to incriminate himself. Whether evidence has been compelled is, of course, a triable issue of fact. And the constitutional command not to compel a person to be a witness against himself, like other issues of fact, must be determined by a resolution of all facts and the "totality" of them offered in evidence. Consequently were the Court's legal formula posed for application in a coerced testimony case, I could agree to it. But it is not. Instead the Court looks to the "totality of circumstances" to show "unfair lineup procedures." This means "unfair" according to the Court's view of what is unfair. The Constitution, however, does not anywhere prohibit conduct deemed unfair by the courts. As we recently said in *United States* v. *Augenblick,* 393 U. S. 348, 352 (1969): "Rules of evidence are designed in the interests of fair trials. But unfairness in result is no sure measure of unconstitutionality."

The Constitution sets up its own standards of unfairness in criminal trials in the Fourth, Fifth, and Sixth Amendments, among other provisions of the Constitution. Many of these provisions relate to evidence and its use in criminal cases. The Constitution provides that the accused shall have the right to compulsory process for obtaining witnesses in his favor. It ordains that evidence shall not be obtained by compulsion of the accused. It ordains that the accused shall have the right to confront the witnesses against him. In these ways the Constitution itself dictates what evidence is to be excluded because it was improperly obtained or because it is not sufficiently reliable. But the Constitution does not give this Court any general authority to require exclusion of all evidence that this Court considers improperly obtained or that this Court considers insufficiently reliable. Hearsay evidence, for example, is in most instances rendered inadmissible by the Confrontation Clause, which reflects a judgment, made by the Framers of the Bill of Rights, that such evidence may be unreliable and cannot be put in proper perspective by cross-examination of the person repeating it in court. Nothing in this constitutional plan suggests that the Framers drew up the Bill of Rights merely in order to mention a few types of evidence "for illustration," while leaving this Court with full power to hold unconstitutional the use of any other evidence that the Justices of this Court might decide was not sufficiently reliable or was not sufficiently subject to exposure by cross-examination. On the contrary, as we have repeatedly held, the Constitution leaves to the States and to the people all these questions concerning the various advantages and disadvantages of admitting certain types of evidence. *Spencer* v. *Texas*, 385 U. S. 554 (1967); *Michelson* v. *United States*, 335 U. S. 469 (1948).

It has become fashionable to talk of the Court's power to hold governmental laws and practices unconstitutional whenever this Court believes them to be "unfair," contrary to basic standards of decency, implicit in ordered liberty, or offensive to "those canons of decency and fairness which express the notions of justice of English-speaking peoples . . . ."[5] All of these different general and indefinable words or phrases are the fruit of the same, what I consider to be poisonous, tree, namely, the doctrine that this Court has power to make its own ideas of fairness, decency, and so forth, enforceable as though they were constitutional precepts. When I consider the incontrovertible fact that our Constitution was written to limit and define the powers of the Federal Government as distinguished from the powers of States, and to divide those powers granted the United States among the separate Executive, Legislative, and Judicial branches, I cannot accept the premise that our Constitution grants any powers except those specifically written into it, or absolutely necessary and proper to carry out the powers expressly granted.

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[5] *Malinski* v. *New York*, 324 U. S. 401, 417 (opinion of Frankfurter, J.) (1945); see also *Rochin* v. *California*, 342 U. S. 165 (1952); *Irvine* v. *California*, 347 U. S. 128 (1954).

I realize that some argue that there is little difference between the two constitutional views expressed below:

> One. No law should be held unconstitutional unless its invalidation can be firmly planted on a specific constitutional provision plus the Necessary and Proper Clause.
>
> Two. All laws are unconstitutional that are unfair, shock the conscience of the Court, offend its sense of decency, or violate concepts implicit in ordered liberty.

The first of these two constitutional standards plainly tells judges they have no power to hold laws unconstitutional unless such laws are believed to violate the written Constitution. The second constitutional standard, based on the words "due process," not only does not require judges to follow the Constitution as written, but actually encourages judges to hold laws unconstitutional on the basis of their own conceptions of fairness and justice. This formula imposes no "restraint" on judges beyond requiring them to follow their own best judgment as to what is wise, just, and best under the circumstances of a particular case. This case well illustrates the extremes to which the formula can take men who are both wise and good. Although due process requires that courts summon witnesses so that juries can determine the guilt or innocence of defendants, the Court, because of its sense of fairness, decides that due process deprives juries of a chance to hear witnesses who the Court holds could not or might not tell the truth.

I began my opposition to this fallacious concept of "due process" even before I became a member of this Court[6] and expressed it formally soon after my service on the Court began.[7] And it was not long before I emphasized that quite a different belief about the meaning of the phrase "due process" had long existed in our judicial history in opposition to the "decency and fairness" doctrine. See *Chambers* v. *Florida,* 309 U. S. 227, 235–236, n. 8 (1940).

My experience on the Court has confirmed my early belief that the "decency and fairness" due process test cannot stand consistently with our written Constitution.

III.

I agree with the Court that we should not undertake to pass on the question of harmless error for the first time in this Court. Under the Court's holding, the case should be remanded to the state courts for decision of this question.

In recent years this Court has, in a series of cases, held that most of the Bill of Rights is now applicable against the States as well as against the Federal Government. This has brought about a tremendous increase in the number of state criminal cases involving federal questions, some of which depend on the particular facts and circumstances of the case. In Fifth Amendment confession cases, for example, courts must under prevailing practice hear evidence to determine whether confessions were compelled. This Court has power in cases of that kind to review evidence before the trial courts. No one can now predict with accuracy how great a number of such cases are destined to come before us, but all know it will be many. Should we not make it an almost invariable practice to accept lower court findings of fact on such issues, our Supreme Court is likely to find itself preoccupied with the business of a state court of criminal appeals, a condition not devoutly to be wished in the Court's interest or in the interest of the administration of justice in general. This problem is magnified many times over when account is taken of the harmless-error rules that many States have now adopted, since these rules also raise factual issues involving a federal question whenever the error itself is federal. See *Chapman* v. *California,* 386 U. S. 18 (1967). If trial errors are found some courts along the line must determine whether the error was harmless. That question has, because of this Court's judgment, now arisen in this case. I agree with the Court that we should not decide this question here. In the present posture of criminal law, there are simply too many federal questions in the state cases before us to defend a practice of our deciding in the first instance that there was no harmless error. There are many reasons for this other than the necessity of saving our time for the vastly more important issues we must decide. To say the least, the question whether an error in a particular case is harmless is an issue peculiarly for lower, not for the highest, appellate courts. Then, too, this issue can usually be tried more efficiently, and just as fairly, by the local court that tried the case or by the local appellate court that heard the first appeal. This Court was not established to try such minor issues of fact for the first time. Of course, I do not mean to suggest that there should be an ironclad rule always barring the Court from deciding an issue in cases if it plainly and manifestly appears that it would be egregiously unjust and undoubtedly wrong to leave an issue undecided. But I do not think this even distantly approaches being such a case. Even though I steadfastly believe the Court's basic holding is error, I do agree that we should not establish a precedent of passing on harmless error for the first time in this Court before the courts below have had an opportunity to consider the question.

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[6] See, *e. g.,* 81 Cong. Rec. App., pt. 9, pp. 638–639; *id.,* at 307.

[7] See, *e. g., McCart* v. *Indianapolis Water Co.,* 302 U. S. 419, 423 (1938) (dissenting opinion).

For the above reasons I dissent from the reversal and remand of this case.

MRKONJIC-RUZIC *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 880. Decided April 1, 1969.

Certiorari granted; 402 F. 2d 836, vacated and remanded.

Gregory S. Stout for petitioner.

Solicitor General Griswold, Acting Assistant Attorney General Kossack, and *Beatrice Rosenberg* for the United States.

PER CURIAM.

The petition for a writ of certiorari is granted, the judgment is vacated and the case is remanded to the United States District Court for the Eastern District of California for further consideration in light of *Alderman* v. *United States, ante,* p. 165.

MR. JUSTICE BLACK dissents.

NICKOLICH *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 1052. Decided April 1, 1969.

Appeal dismissed and certiorari denied.

George E. Tyack for appellant.

E. Raymond Morehart for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

HOTEL & RESTAURANT EMPLOYEES UNION LOCAL NO. 556 ET AL. v. EMERY ET UX., DBA MAIN DINER.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

No. 988. Decided April 1, 1969.

281 Minn. 334, 161 N. W. 2d 842, appeal dismissed and certiorari denied.

Solly Robins, Stanford Robins, J. W. Brown, Benjamin Gettler, and *Jonas Katz* for appellants.

John S. Connolly for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and the case set for oral argument.

DeLURY ET AL. v. CITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 1029. Decided April 1, 1969.

23 N. Y. 2d 175, 243 N. E. 2d 128, appeal dismissed.

Paul O'Dwyer, W. Bernard Richland, Morris Weissberg, and *John J. DeLury, Jr.,* for appellants.

J. Lee Rankin, Frederic S. Nathan, and *Stanley Buchsbaum* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a properly presented federal question.

MITCHELL ET AL. v. RIDDELL, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 1044. Decided April 1, 1969.

402 F. 2d 842, appeal dismissed and certiorari denied.

Solicitor General Griswold, Assistant Attorney General Walters, and *Gilbert E. Andrews* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MacQUARRIE v. McLAUGHLIN, REGISTRAR OF MOTOR VEHICLES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

No. 1483, Misc. Decided April 1, 1969.

294 F. Supp. 176, affirmed.

PER CURIAM.

The judgment is affirmed.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and the case set for oral argument.

FANNON *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 1274, Misc. Decided April 1, 1969.

Certiorari granted; 403 F. 2d 391, vacated and remanded.

John J. Cleary for petitioner.

Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg, and *Mervyn Hamburg* for the United States.

PER CURIAM.

The motion to supplement the record is granted. The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States District Court for the Northern District of Illinois for further consideration in light of *Alderman* v. *United States, ante,* p. 165.

MR. JUSTICE BLACK dissents.

ROSE *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 1460, Misc. Decided April 1, 1969.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

KAUFER *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 1041. Decided April 1, 1969.

Certiorari granted; 406 F. 2d 550, affirmed.

Frederick H. Block and *Herbert Monte Levy* for petitioner.

Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg, and *Roger A. Pauley* for the United States.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is affirmed. *Desist* v. *United States, ante,* p. 244.

MR. JUSTICE DOUGLAS and MR. JUSTICE FORTAS dissent from the affirmance of the judgment.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE would deny the petition for a writ of certiorari.

McCARTHY *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 43. Argued December 9, 1968.—Decided April 2, 1969.

Petitioner was indicted on three counts for "wilfully and knowingly" attempting to evade federal tax payments and on arraignment pleaded not guilty to each count. On the day set for trial petitioner's counsel, after informing the court that he had "advised . . . [petitioner] of the consequences of a plea," moved to enter a plea of guilty to one count. In answer to the District Judge's inquiry, petitioner stated that he desired to plead guilty and understood that such a plea waived his right to a jury trial and subjected him to as long as five years' imprisonment and as much as a $10,000 fine. The Government consented to the plea change and agreed to dismiss the other two counts if petitioner's guilty plea to the one count was accepted. Replying to the judge's inquiry made at the Government's request and before the plea was accepted petitioner stated that his plea was not the product of threats or promises but was entered of his "own volition." At the subsequent sentencing hearing petitioner asserted that his failure to pay taxes was "not deliberate" and that they would have been paid had he not been in poor health. The judge imposed a sentence of one year and a $2,500 fine. Petitioner's counsel moved to suspend sentence, stressing that petitioner, then 65, was in poor health and that his "neglectful" and "inadvertent" bookkeeping practices occurred during a period when he had been suffering from a very serious drinking problem. The judge, declining to suspend sentence, indicated that he had examined the presentence report and concluded that petitioner's bookkeeping methods were not "inadvertent." On appeal petitioner urged the setting aside of his plea as violative of Fed. Rule Crim. Proc. 11 on the grounds (1) that the District Court had accepted his plea "without first addressing [him] . . . personally and determining that the plea [was] . . . made voluntarily with understanding of the nature of the charge . . . ," and (2) that the court had entered judgment without determining "that there [was] . . . a factual basis for the plea." The Court of Appeals affirmed, implying that the Rule did not *require* the District Judge to address petitioner personally if petitioner understood the nature of the charge and concluding that at the sentencing hearing the judge had satisfied himself from the presentence report that the plea had a factual basis. *Held:*

1. Fed. Rule Crim. Proc. 11 was not complied with in this case. The Rule, which is designed (1) to assist the district judge in making the constitutionally required determination that a guilty plea is truly voluntary and (2) to produce a complete record when the plea is entered of the factors relevant to the voluntariness determination, mandates the district judge's direct inquiry of a defendant pleading guilty as to whether the defendant understands the nature of the charge against him and is aware of the consequences of his plea. Pp. 464–467.

2. Noncompliance by the District Court with Rule 11 requires that the defendant's guilty plea be set aside and his case remanded for another hearing at which he may plead anew. Pp. 468–472.

387 F. 2d 838, reversed and remanded.

Maurice J. McCarthy argued the cause for petitioner. With him on the briefs were *Barnabas F. Sears* and *Wayland B. Cedarquist.*

James Van R. Springer argued the cause for the United States. On the brief were *Solicitor General Griswold, Assistant Attorney General Rogovin, Francis X. Beytagh, Jr., Beatrice Rosenberg,* and *Mervyn Hamburg.*

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case involves the procedure that must be followed under Rule 11 of the Federal Rules of Criminal Procedure before a United States District Court may accept a guilty plea and the remedy for a failure to follow that procedure.

On April 1, 1966, petitioner was indicted on three counts in the United States District Court for the Northern District of Illinois for violating § 7201 of the Internal Revenue Code. He was charged with "wilfully and knowingly" attempting to evade tax payments of $928.74 for 1959 (count 1), $5,143.70 for 1960 (count 2), and $1,207.12 for 1961 (count 3). At his arraignment two weeks later, petitioner, who was represented by retained counsel, pleaded not guilty to each count. The court scheduled his trial for June 30; but on June 29, it granted the Government's motion to postpone the trial because of petitioner's illness. The trial was rescheduled for July 15.

On that day, after informing the court that he had "advised . . . [petitioner] of the consequences of a plea," defense counsel moved to withdraw petitioner's plea of not guilty to count 2 and to enter a plea of guilty to that count. The District Judge asked petitioner if he desired to plead guilty and if he understood that such a plea waived his right to a jury trial and subjected him to imprisonment for as long as five years and to a fine as high as $10,000. Petitioner stated that he understood these consequences and wanted to plead guilty. The Government consented to this plea change and informed the court that if petitioner's plea of guilty to count 2 were accepted, the Government would move to dismiss counts 1 and 3. Before the plea was accepted, however, the prosecutor asked the judge to inquire whether it had been induced by any threats or promises. In response to the judge's inquiry, petitioner replied that his plea was not the product of either. He stated that it was entered of his "own volition." The court ordered a presentence investigation and continued the case to September 14, 1966.[1]

At the commencement of the sentencing hearing on September 14, petitioner asserted that his failure to pay taxes was "not deliberate" and that they would have been paid if he had not been in poor health. The prosecutor stated that the "prime consideration" for the Government's agreement to move to dismiss counts 1 and 3 was petitioner's promise to pay all taxes, penalties, and interest. The prosecutor then requested the court to refer expressly to this agreement. After noting that petitioner possessed sufficient attachable assets to meet these obligations, the court imposed a sentence of one year and a fine of $2,500. Petitioner's counsel immediately moved to suspend the sentence. He emphasized that petitioner, who was then 65 years of age, was in poor health and contended that his failure to pay his taxes had resulted from his "neglectful" and "inadvertent" method of bookkeeping during a period when he had been suffering from a very serious drinking problem. Consequently, asserted petitioner's counsel, "there was never any disposition to deprive the United States of its due." The judge, however, after indicating he had examined the presentence report, stated his opinion that "the manner in which [petitioner's] books were kept was not inadvertent." He declined, therefore, to suspend petitioner's sentence.[2]

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[1] The relevant portion of the colloquy at this hearing is quoted in Appendix A.

On appeal to the United States Court of Appeals for the Seventh Circuit, petitioner argued that his plea should be set aside because it had been accepted in violation of Rule 11 of the Federal Rules of Criminal Procedure. Specifically, petitioner contended (1) that the District Court had accepted his plea "without first addressing [him] . . . personally and determining that the plea [was] . . . made voluntarily with understanding of the nature of the charge . . . ,"[3] and (2) that the court had entered judgment without determining "that there [was] . . . a factual basis for the plea."[4]

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[2] Defense counsel's account of petitioner's personal problems during the period he allegedly evaded his income taxes is quoted in Appendix B.

[3] Fed. Rule Crim. Proc. 11.

[4] *Ibid.* Both of these provisions were added by the 1966 amendment to Rule 11. The amendment became effective on July 1, 1966. It is italicized on the next page in the following quotation of the Rule:

"A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea

In affirming petitioner's conviction,[5] the Court of Appeals held that the District Judge had complied with Rule 11. The court implied that the Rule did not *require* the District Judge to address petitioner personally to determine if he understood the nature of the charge. The court also concluded that the colloquy at the sentencing hearing demonstrated that the judge had satisfied himself by an examination of the presentence report that the plea had a factual basis.[6]

Because of the importance of the proper construction of Rule 11 to the administration of criminal law in the federal courts,[7] and because of a conflict in the courts of appeals over the effect of a district court's failure to follow the provisions of the Rule,[8] we granted certiorari. 390 U. S. 1038 (1968). We agree with petitioner that the District Judge did not comply with Rule 11 in this case; and in reversing the Court of Appeals, we hold that a defendant is entitled to plead anew if a United

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of guilty, and shall not accept *such* plea *or a plea of nolo contendere* without first *addressing the defendant personally and* determining that the plea is made voluntarily with understanding of the nature of the charge *and the consequences of the plea.* If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. *The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.*"

[5] 387 F. 2d 838 (C. A. 7th Cir. 1968).

[6] The Advisory Committee suggests three methods of determining that a factual basis exists for a guilty plea: (1) inquiring of the defendant; (2) inquiring of the prosecutor; (3) examining the presentence report. Fed. Rule Crim. Proc. 11, Notes of Advisory Committee on Criminal Rules.

[7] During 1968 approximately 86% (22,055 out of 25,674) of all convictions obtained in the United States district courts were pursuant to a plea of guilty or its substantial equivalent, a plea of *nolo contendere.* 1968 Director of the Administrative Office of the United States Courts Ann. Rep. 261.

[8] See nn. 22 and 23, *infra.*

States district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11. This decision is based solely upon our construction of Rule 11 and is made pursuant to our supervisory power over the lower federal courts; we do not reach any of the constitutional arguments petitioner urges as additional grounds for reversal.

I.

Rule 11 expressly directs the district judge to inquire whether a defendant who pleads guilty understands the nature of the charge against him and whether he is aware of the consequences of his plea. At oral argument, however, counsel for the Government repeatedly conceded that the judge did not personally inquire whether petitioner understood the nature of the charge. At one point, counsel stated quite explicitly: "The subject on which he [the District Judge] did not directly address the defendant, which is raised here, is the question of the defendant's understanding of the charges." Nevertheless, the Government argues that since petitioner stated his desire to plead guilty, and since he was informed of the consequences of his plea, the District Court "could properly *assume* that petitioner was entering that plea with a complete understanding of the charge against him."[9] (Emphasis added.)

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[9] The Government agrees with the Court of Appeals that the record of the September 14 sentencing hearing demonstrates that the District Judge satisfied himself by examining the presentence report that there was a factual basis for the plea. However, because of the Government's concession at oral argument that the judge did not inquire whether petitioner understood the nature of the charge, and because of our holding that any noncompliance with Rule 11 is reversible error, we need not consider the Government's contention that the record adequately supports the Court of Appeals' conclusion that the district judge satisfied himself that there was a factual basis for the plea.

We cannot accept this argument, which completely ignores the two purposes of Rule 11 and the reasons for its recent amendment. First, although the procedure embodied in Rule 11 has not been held to be constitutionally mandated,[10] it is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary.[11] Second, the Rule is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination. Thus, the more meticulously the Rule is adhered to, the more it tends to discourage, or at least to enable more expeditious disposition of, the numerous and often frivolous post-conviction attacks on the constitutional validity of guilty pleas.[12]

Prior to the 1966 amendment, however, not all district judges personally interrogated defendants before accepting their guilty pleas.[13] With an awareness of the confusion over the Rule's requirements in this respect, the draftsmen amended it to add a provision "expressly requir[ing] the court to address the defendant personally." [14] This clarification of the judge's responsibilities quite obviously furthers both of the Rule's purposes. By personally interrogating the defendant, not only will the judge be better able to ascertain the plea's voluntariness, but he also will develop a more complete record to support his determination in a subsequent post-conviction attack.

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[10] See *Waddy* v. *Heer,* 383 F. 2d 789 (C. A. 6th Cir. 1967).

[11] See, *e. g., Machibroda* v. *United States,* 368 U. S. 487, 493 (1962); *Von Moltke* v. *Gillies,* 332 U. S. 708 (1948); *Waley* v. *Johnston,* 316 U. S. 101 (1942).

[12] See *Stephens* v. *United States,* 376 F. 2d 23 (C. A. 10th Cir.), cert. denied, 389 U. S. 881 (1967); *Rimanich* v. *United States,* 357 F. 2d 537 (C. A. 5th Cir. 1966); *Kadwell* v. *United States,* 315 F. 2d 667, 669 n. 6 (C. A. 9th Cir. 1963); Orfield, Pleas in Federal Criminal Procedure, 35 Notre Dame Law. 1, 31–32 (1959).

Chief Judge Walter E. Hoffman of the United States District Court for the Eastern District of Virginia has stated that "[t]he multitude of questions presented by the arraignment and plea under Rules 10 and 11 furnish the most frequent basis for attack in the popular post-conviction remedy available to federal prisoners." Hoffman, What Next in Federal Criminal Rules?, 21 Wash. & Lee L. Rev. 1, 8 (1964).

[13] See Fed. Rule Crim. Proc. 11, Notes of Advisory Committee on Criminal Rules.

These two purposes have their genesis in the nature of a guilty plea. A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers.[15] For this waiver to be valid under the Due Process Clause, it must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.[16] Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.[17]

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[14] *Ibid.*

[15] See L. Orfield, Criminal Procedure Under the Federal Rules § 11:12 (1966); A. Enker, Perspectives on Plea Bargaining, President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report: The Courts, Appendix A, 116 (1967); Note, Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas, 112 U. Pa. L. Rev. 865, 871-872 (1964).

[16] See n. 11, *supra.*

[17] See D. Newman, Conviction, The Determination of Guilt or Innocence Without Trial 23 (1966); ABA Project on Minimum Standards for Criminal Justice: Standards Relating to Pleas of Guilty § 1.4 (a), commentary (Tent. Draft 1967).

Thus, in addition to directing the judge to inquire into the defendant's understanding of the nature of the charge and the consequences of his plea, Rule 11 also requires the judge to satisfy himself that there is a factual basis for the plea. The judge must determine "that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty." [18] Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." [19]

To the extent that the district judge thus exposes the defendant's state of mind on the record through personal interrogation, he not only facilitates his own determination of a guilty plea's voluntariness, but he also facilitates that determination in any subsequent post-conviction proceeding based upon a claim that the plea was involuntary. Both of these goals are undermined in proportion to the degree the district judge resorts to "assumptions" not based upon recorded responses to his inquiries. For this reason, we reject the Government's contention that Rule 11 can be complied with although the district judge does not personally inquire whether the defendant understood the nature of the charge.[20]

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[18] Fed. Rule Crim. Proc. 11, Notes of Advisory Committee on Criminal Rules.

[19] *Ibid.*

[20] The nature of the inquiry required by Rule 11 must necessarily vary from case to case, and, therefore, we do not establish any general guidelines other than those expressed in the Rule itself. As our discussion of the facts in this particular case suggests, however, where the charge encompasses lesser included offenses, per-

II.

Having decided that the Rule has not been complied with, we must also determine the effect of that noncompliance, an issue that has engendered a sharp difference of opinion among the courts of appeals. In *Heiden* v. *United States*, 353 F. 2d 53 (1965), the Court of Appeals for the Ninth Circuit held that when the district court does not comply fully with Rule 11 the defendant's guilty plea must be set aside and his case remanded for another hearing at which he may plead anew.[21] Other courts of appeals, however, have consistently rejected this holding, either expressly[22] or tacitly.[23] Instead, they have adopted the approach

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sonally addressing the defendant as to his understanding of the essential elements of the charge to which he pleads guilty would seem a necessary prerequisite to a determination that he understands the meaning of the charge. In all such inquiries, "[m]atters of reality, and not mere ritual, should be controlling." *Kennedy* v. *United States*, 397 F. 2d 16, 17 (C. A. 6th Cir. 1968).

[21] After two separate panels had applied *Heiden* retroactively without discussion in *Geter* v. *United States*, 353 F. 2d 208 (1965), and *Freeman* v. *United States*, 350 F. 2d 940, 943 (1965), in a subsequent *en banc* decision the Ninth Circuit held that it would not apply *Heiden* to cases in which the guilty plea was accepted before the date on which *Heiden* was decided. *Castro* v. *United States*, 396 F. 2d 345 (C. A. 9th Cir. 1968).

[22] *Kennedy* v. *United States*, 397 F. 2d 16 (C. A. 6th Cir. 1968); *Halliday* v. *United States*, 380 F. 2d 270 (C. A. 1st Cir. 1967) ("at least with respect to [pre-amended] Rule 11"); *Stephens* v. *United States*, 376 F. 2d 23 (C. A. 10th Cir.), cert. denied, 389 U. S. 881 (1967); *Brokaw* v. *United States*, 368 F. 2d 508 (C. A. 4th Cir. 1966), cert. denied, 386 U. S. 996 (1967) (at least where the defendant raises only the factual issues of voluntariness).

[23] *United States* v. *Del Piano*, 386 F. 2d 436 (C. A. 3d Cir. 1967), cert. denied, 392 U. S. 936 (1968); *Lane* v. *United States*, 373 F. 2d 570 (C. A. 5th Cir. 1967); *United States* v. *Kincaid*, 362 F. 2d 939 (C. A. 4th Cir. 1966); *Bartlett* v. *United States*, 354 F. 2d 745 (C. A. 8th Cir. 1966).

urged by the Government, which is to place upon the Government the burden of demonstrating from the record of the Rule 11 hearing that the guilty plea was voluntarily entered with an understanding of the charge. See, *e. g., Halliday* v. *United States,* 380 F. 2d 270 (C. A. 1st Cir. 1967); *Lane* v. *United States,* 373 F. 2d 570 (C. A. 5th Cir. 1967).[24] In these circuits, if voluntariness cannot be determined from the record, the case is remanded for an evidentiary hearing on that issue. See, *e. g., Kennedy* v. *United States,* 397 F. 2d 16 (C. A. 6th Cir. 1968); *Halliday* v. *United States, supra.*

We are persuaded that the Court of Appeals for the Ninth Circuit has adopted the better rule. From the defendant's perspective, the efficacy of shifting the burden of proof to the Government at a later voluntariness hearing is questionable. In meeting its burden, the Government will undoubtedly rely upon the defendant's statement that he desired to plead guilty and frequently a statement that the plea was not induced by any threats or promises. This prima facie case for voluntariness is likely to be treated as irrebuttable in cases such as this one, where the defendant's reply is limited to his own plaintive allegations that he did not understand the nature of the charge and therefore failed to assert a valid defense or to limit his guilty plea only to a lesser included offense. No matter how true these allegations may be, rarely, if ever, can a defendant corroborate them in a post-plea voluntariness hearing.

Rule 11 is designed to eliminate any need to resort to a later fact-finding proceeding "in this highly subjective area." *Heiden* v. *United States, supra,* at 55. The Rule "contemplates that disputes as to the understanding of the defendant and the voluntariness of his action are to be eliminated at the outset . . . ." *Ibid.* As the Court of Appeals for the Sixth Circuit explained in discussing what it termed the "persuasive rationale" of *Heiden:* "When the ascertainment is subsequently made, greater uncertainty is bound to exist since in the resolution of disputed contentions problems of credibility and of reliability of memory cannot be avoided . . . ." *Waddy* v. *Heer,* 383 F. 2d 789, 794 (1967). There is no adequate substitute for demonstrating *in the record at the time the plea is entered* the defendant's understanding of the nature of the charge against him.

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[24] See 8 J. Moore, Federal Practice ¶ 11.03 [1], at 11-22 (2d ed. 1968). But see *United States* v. *Pate,* 357 F. 2d 911 (C. A. 7th Cir. 1966).

The wisdom of Rule 11's requirements and the difficulty of achieving its purposes through a post-conviction voluntariness hearing are particularly apparent in this case. Petitioner, who was 65 years old and in poor health at the time he entered his plea, had been suffering from a serious drinking problem during the time he allegedly evaded his taxes. He pleaded guilty to a crime that requires a "knowing and willful" attempt to defraud the Government of its tax money; [25] yet, throughout his sentencing hearing, he and his counsel insisted that his acts were merely "neglectful," "inadvertent," and committed without "any disposition to deprive the United States of its due." Remarks of this nature cast considerable doubt on the Government's assertion that petitioner pleaded guilty with full awareness of the nature of the charge. Nevertheless, confronted with petitioner's statement that he entered his plea of his "own volition," his counsel's statement that he explained the nature of the charges, and evidence that petitioner did owe the Government back taxes, both the District Court and the Court of Appeals concluded that petitioner's guilty plea was voluntary.

Despite petitioner's inability to convince the courts below that he did not fully understand the charge against him, it is certainly conceivable that he may have intended to acknowledge only that he in fact owed the Government the money it claimed without necessarily admitting that he committed the crime charged; for that crime requires the very type of specific intent that he repeatedly disavowed. See *Sansone* v. *United States,* 380 U. S. 343 (1965). Moreover, since the elements of the offense were not explained to petitioner, and since the specific acts of tax evasion do not appear of record, it is also possible that if petitioner had been adequately informed he would have concluded that he was actually guilty of one of two closely related lesser included offenses, which are mere misdemeanors.[26]

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[25] *Sansone* v. *United States,* 380 U. S. 343 (1965).

On the other hand, had the District Court scrupulously complied with Rule 11, there would be no need for such speculation. At the time the plea was entered, petitioner's own replies to the court's inquiries might well have attested to his understanding of the essential elements of the crime charged, including the requirement of specific intent, and to his knowledge of the acts which formed the basis for the charge. Otherwise, it would be apparent to the court that the plea could not be accepted. Similarly, it follows that, if the record had been developed properly, and if it demonstrated that petitioner entered his plea freely and intelligently, his subsequent references to neglect and inadvertence could have been summarily dismissed as nothing more than overzealous supplications for leniency.

We thus conclude that prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea. Our holding that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew not only will insure that every accused is afforded those procedural safeguards, but also will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate. It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking.

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[26] Willfully filing a fraudulent or false return is a misdemeanor under § 7207 of the Internal Revenue Code, and willfully failing to pay taxes is a misdemeanor under § 7203 of the Code. The close interrelationship between these two offenses and the felony for which petitioner was convicted under § 7201 is explained in detail in *Sansone*.

We therefore reverse the judgment of the Court of Appeals for the Seventh Circuit and remand the case for proceedings consistent with this opinion.

It is so ordered.

APPENDIX A TO OPINION OF THE COURT.

The relevant portion of the colloquy at the Rule 11 hearing on July 15 is as follows:

> "Mr. Sokol [petitioner's counsel]: . . . If the Court please, I have advised Mr. McCarthy of the consequences of a plea. At this time, in his behalf I would like to withdraw the plea of not guilty heretofore entered to Count 2, and enter a plea of guilty to Count 2. There are three Counts.
>
> "The Court: Is that satisfactory to the government?
>
> "Mr. Hughes [Government counsel]: Satisfactory to the government, your Honor. The government will move to dismiss Counts 1 and 3.

"The Court: There will be a disposition in regard to the other Count?

"Mr. Sokol: He has just moved to dismiss Counts 1 and 3.

"The Court: Not until the plea is accepted and there is a judgment thereon.

"Mr. Hughes: Correct.

"The Court: This is tax evasion, five and ten?

"Mr. Hughes: Yes, your Honor, a maximum penalty of five years and $10,000.

"The Court: Mr. McCarthy, your lawyer tells me that you want to enter a plea of guilty to this second Count of this indictment; is that true?

"Defendant McCarthy: Yes, your Honor.

"The Court: You understand on your plea of guilty to the second Count of this indictment, you are waiving your right to a jury trial?

"Defendant McCarthy: Yes, your Honor.

"The Court: You understand on your plea of guilty you may be incarcerated for a term not to exceed five years?

"Defendant McCarthy: Yes, your Honor.

"The Court: You understand you may be fined in an amount not in excess of $10,000?

"Defendant McCarthy: Yes, your Honor.

"The Court: Knowing all that, you still persist in your plea of guilty?

"Defendant McCarthy: Yes, your Honor.

"The Court: The record will show that this defendant, after being advised of the consequences of his plea to Count 2 of this indictment, persists in his plea. The plea will be accepted. There will be a finding of guilty in the manner and form as charged in Count 2 of this indictment, judgment on that finding.

"Now, in regard to Counts 1 and 3?

> "Mr. Hughes: Your Honor, the government will move to dismiss them. I would also request the Court to ask whether or not any promises or threats have been made.
>
> "Mr. Sokol: No, no promises or threats.
>
> "The Court: I am going to ask the defendant himself. Have any promises been made to you for entering a plea of guilty?
>
> "Defendant McCarthy: No, your Honor.
>
> "The Court: Has anybody threatened you that if you didn't enter a plea of guilty something would happen to you?
>
> "Defendant McCarthy: I beg your pardon?
>
> "The Court: Has anybody threatened you to enter a plea of guilty?
>
> "Defendant McCarthy: That's right, of my own volition, your Honor.
>
> "The Court: All right. Enter a pre-trial investigation order and continue the matter until the 14th day of September. Same bond may stand."

APPENDIX B TO OPINION OF THE COURT.

The colloquy at the September 14 sentencing hearing included the following:

> "Mr. Sokol [petitioner's counsel]: . . . If the Court please, apart from the wrecking of his physical health that has attended a number of the problems that relate to the drinking in this case, this man has experienced a kind of punishment, self-inflicted, which almost is a categorical listing of how he flees, actually, and I use that word advisedly, flees from consequence to punishment to additional consequence. It is a sad thing when at the age of sixty-five a man who has been able to rear, with the help of his wife, a fine family, has to leave a legacy such as this. I submit to the Court that he needs

no deterrent. I cannot imagine a man—apart from the conventional contrition, he has actively sought out help in order to overcome what has become a very, very serious physical and psychological problem.

"When I spoke with Mr. Sanculius [the probation officer], I knew that we had given to him some reference to the fact and some attestations of the facts, supported the facts, that there had been a very, very serious psychological problem here.

"With respect to the tax case itself, he never took one single step to delude the investigating officer from the very, very start, and this was before Counsel was in the matter. He extended—in other words, he was open and he answered all questions readily.

"The Court: Yes, but his books were in such shape that it made it very difficult to—and that, in my opinion, was not inadvertent.

. . . . .

"Mr. Sokol: . . . When a man is neglectful and adopts a kind of a devious way of secreting himself from the government, that is one thing, and we are mindful they are kind of indicia of fraud. But where a man's pattern is neglect of not only something like this—he is sloppy with respect to that, but in gross, in gross, unaccountable, so to speak.

"There was no direct relationship to the consesquences of taxation. Now, I would like to point out in that connection that when the investigation commenced it zeroed in, and very, very properly, there was a disclosure made from the very, very first that in the case of the Blue Cross check, the matter of depositing that in a second account actually had absolutely nothing whatever to do with the government. At that time he had been very, very deeply involved in a protracted drinking situation and had been in the hospital for several weeks. His family, in order to avoid the matter of him really needing somebody to lead him around by the nose said, and his wife said, 'You have to put yourself under the jurisdiction of your brother,' and there was some indication that he was supposed to deposit this and he would not have disposition over his own assets. They did not feel that he could look out for himself. He was oppressed, and there is no sense in going over how people become so. In this particular case with a history after sixty-five years of this kind of a situation, one can perhaps guess without going into Freudian terms he was oppressed, and in order to free himself—and this had nothing to do with the government—in order to free himself from what he felt was a trap situation where he, at the age of sixty-two or sixty-three was being treated like a little boy, he put it in a different bank account. But there was never any disposition to deprive the United States of its due.

"He has never acted, actually, in what you would call normal consequence, because an interview with this man, even once, indicates that if he has—and it is like a little boy—if he has the consequence lying before him he says, 'Oh, yes.'

. . . . .

"Mr. Sokol: He did not act in contemplation of avoiding taxation. That was a natural consequence of what can best be described as gross neglect, and criminal neglect, if you please.

"I could not have, in good conscience, recommended that he go into a plea if I did not feel that neglect has become criminal when it reaches a certain stage. But this was not a part of any elaborate scheme or any devious course of conduct where he was acting in contemplation of a tax return that—

"The Court: It took place over a series of four years, didn't it, Counsel?

"Mr. Sokol: No, your Honor, because the real problem related to the matter of his avoiding the accountability not to his government but to the matter of the spending money.

"The Court: Well, I am sure that if the government had not stepped in, why, it would have lasted over a period of eight years.

"Mr. Sokol: No, he had already done this, apart from the fact that he had sought help with respect to the drinking, apart from the fact that he had sought help with respect to the psychiatric problem, and apart from the fact that he had already, so to speak, contained himself, he did, in addition, seek out the help of Mr. Abraham Angram, my associate counsel in the case, who was guiding him and he was on the right path. No, he had—I want to point out to the Court that this has occurred. This is fait accompli."

MR. JUSTICE BLACK, concurring.

I concur, though not without some doubt, in the reversal of the judgment of conviction in this case. Rule 11 of the Federal Rules of Criminal Procedure requires that the trial judge personally address a defendant who pleads guilty in order to ascertain if he understands the nature of the crime of which he has pleaded guilty. In this case the trial judge did not personally address the defendant but seems to have accepted the statement of the defendant's lawyer that he had advised the petitioner of the consequences of a plea of guilty. I base my concurrence in the judgment not upon any "supervisory power" of this Court, however, but exclusively on the failure of the judge to first address the defendant personally, as required by Rule 11.

BOULDEN *v.* HOLMAN, WARDEN.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 644. Argued February 26, 1969.—Decided April 2, 1969.

Petitioner was convicted of first-degree murder and sentenced to death in accordance with the jury's verdict. After the conviction was affirmed by the Alabama Supreme Court petitioner requested federal habeas corpus relief on the ground that the introduction of a confession into evidence at his trial (which antedated *Escobedo* v. *Illinois,* 378 U. S. 478, and *Miranda* v. *Arizona,* 384 U. S. 436) violated his constitutional rights. After a full hearing the District Court found the confession voluntary and the Court of Appeals affirmed. In his brief in this Court petitioner raised the question whether the jury that sentenced him to death was selected in accordance with the principles recently announced in *Witherspoon* v. *Illinois,* 391 U. S. 510. *Held:*

1. The lower courts' holding that petitioner's confession was voluntary is justified. Pp. 479–481.

2. Since several veniremen were excused for cause apparently because they voiced general objections to the death penalty, it appears that the sentence of death cannot constitutionally stand under *Witherspoon, supra,* and the cause is remanded to the District Court where this belated issue may be fully considered. Pp. 481–484.

385 F. 2d 102, vacated and remanded.

William B. Moore, Jr., by appointment of the Court, 393 U. S. 930, argued the cause and filed a brief for petitioner.

David W. Clark, Assistant Attorney General of Alabama, argued the cause for respondent. With him on the brief was *MacDonald Gallion,* Attorney General.

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner was convicted in the Circuit Court of Morgan County, Alabama, of first-degree murder, and was sentenced to death in accordance with the verdict of the jury. After the Alabama Supreme Court affirmed the conviction, 278 Ala. 437, 179 So. 2d 20, the petitioner instituted this habeas corpus proceeding in the United States District Court for the Middle District of Alabama. District Judge Frank M. Johnson, Jr., denied relief, 257 F. Supp. 1013, and the Court of Appeals for the Fifth Circuit affirmed. 385 F. 2d 102, rehearing denied, 393 F. 2d 932, 395 F. 2d 169. We granted certiorari. 393 U. S. 822.

I.

Although there was substantial additional evidence of the petitioner's guilt, his conviction was based in part on a confession he had made some days after his arrest. His request for habeas corpus relief rested on a claim that the introduction of that confession into evidence violated his rights under the Constitution.[1] Since his

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[1] Two confessions were in fact obtained, although only the second was actually introduced into evidence. Both the District Court and the Court of Appeals properly noted that the second confession might have been the "end product of the earlier" one, in that "the accused [may have been] acutely aware that he had earlier made admissions against his interest and was, therefore, merely repeating his ostensibly uneraseable [*sic*] words of confession." 385 F. 2d, at 106. See *Darwin* v. *Connecticut,* 391 U. S. 346; *Beecher* v. *Alabama,* 389 U. S. 35; cf. *United States* v. *Bayer,* 331 U. S. 532, 540. Consequently, in order to determine whether the second confession was properly admitted, they passed upon the voluntariness of the first as well as the second confession. We have considered the record in like fashion.

There is evidence that even before his two formal confessions were obtained, the petitioner had, shortly after his arrest, admitted killing the deceased. The evidence was controverted, both as to whether the petitioner made any such admission and as to whether, if he did, the admission was voluntary. It is suggested in dissent that because the opinions of the District Court and the Court of Appeals do not explicitly refer to that evidence, it must be assumed that those courts did not consider it, and that the conclusions they reached should therefore not be sustained. We cannot agree. The trial antedated our decisions in *Escobedo* v. *Illinois,* 378 U. S. 478, and *Miranda* v. *Arizona,* 384 U. S. 436, that claim is essentially a contention that under the constitutional standards prevailing prior to those decisions, his confession was made involuntarily. See *Johnson* v. *New Jersey,* 384 U. S. 719; *Davis* v. *North Carolina,* 384 U. S. 737.

After holding a full hearing regarding the issue and considering the state court record, the District Court, in an opinion applying the proper constitutional standards, was unable to conclude that the petitioner's confession was "other than voluntarily made." The confession, the court found, "simply was not coerced." 257 F. Supp., at 1017, 1016. The Court of Appeals, likewise applying appropriate standards, similarly could "find from the record here no plausible suggestion that Boulden's will was overborne . . . ." 385 F. 2d, at 107.[2]

Little purpose would be served by an extensive summation of the record in the District Court proceedings and in the state trial court. The question whether a confession was voluntarily made necessarily turns on the "totality of the circumstances"[3] in any particular case, and most of the relevant circumstances surrounding the petitioner's confession are set out in the opinions of the District Court and the Court of Appeals. Suffice it to say that we have made an independent study of the entire record[4] and have determined that, although the

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petitioner has consistently contended that the events immediately following his arrest contributed to the involuntariness of his later confessions, and we are unable to assume that the evidence referred to was not considered by the District Court and the Court of Appeals. In any event, our own decision with respect to the voluntariness issue has been reached with that evidence fully in mind.

[2] In affirming the petitioner's conviction, the Alabama Supreme Court had reached a like conclusion. 278 Ala., at 446-452, 179 So. 2d, at 28-34.

[3] *Fikes* v. *Alabama,* 352 U. S. 191, 197.

[4] See *Spano* v. *New York,* 360 U. S. 315, 316.

issue is a relatively close one, the conclusion reached by the District Court and the Court of Appeals was justified.

II.

In seeking habeas corpus the petitioner challenged only the admission of his confession into evidence, and his petition for certiorari was limited to that claim. In his brief and in oral argument on the merits, however, he has raised a substantial additional question: whether the jury that sentenced him to death was selected in accordance with the principles underlying our decision last Term in *Witherspoon* v. *Illinois,* 391 U. S. 510.

We held in *Witherspoon* that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U. S., at 522. In the present case, the record indicates that no less than 15 prospective jurors were excluded by the prosecution under an Alabama statute that provides:

> "On the trial for any offense which may be punished capitally, . . . it is a good cause of challenge by the state that the person has a fixed opinion against capital . . . punishmen[t] . . . ."[5]

That statutory standard has been construed by the Alabama Supreme Court to authorize the exclusion of potential jurors who, although "opposed to capital punishment, . . . would hang some men." *Untreinor* v. *State,* 146 Ala. 26, 33, 41 So. 285, 287.

However, as we emphasized in *Witherspoon,* "The critical question . . . is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood—or misunderstood—by prospective jurors." 391 U. S., at 516, n. 9. "The most that can be demanded of a venireman in this regard," we said, "is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out . . . ." *Id.*, at 522, n. 21. We made it clear that "[u]nless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position." *Id.*, at 516, n. 9.

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[5] Ala. Code, Tit. 30, § 57.

It appears that at the petitioner's trial two prospective jurors were excluded only after they had acknowledged that they would "never" be willing to impose the death penalty.[6] Eleven veniremen, however, appear to have been excused for cause simply on the basis of their affirm-

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[6] "THE COURT: . . . Do you have a fixed opinion against capital or penitentiary punishment?

"JOHN L. NELSON raised his hand.

"MR. HUNDLEY: Challenge.

"THE COURT: Do you have a fixed opinion against capital or penitentiary punishment?

"MR. NELSON: Capital punishment.

"THE COURT: You think you would never be willing to inflict the death penalty in any type case?

"MR. NELSON: Yes, sir.

"MR. HUNDLEY: We challenge.

"THE COURT: Defendant?

"MR. CHENAULT: No questions.

"THE COURT: Stand aside, Mr. Nelson.

"E. O. MOON raised his hand.

[*Footnote 6 continued on page 483*]

ative answers to the question whether, in the statutory language, they had "a fixed opinion against" capital punishment. The following excerpt from the record is typical of those instances:

> "THE COURT: Do you have a fixed opinion against capital punishment?
>
> "MR. SEIBERT: Yes, sir.
>
> "MR. HUNDLEY: We challenge.
>
> "THE COURT: Defendant?
>
> "MR. CHENAULT: No questions.
>
> "THE COURT: Stand aside. You are excused."

Two other veniremen seem to have been excluded merely by virtue of their statements that they did not "believe in" capital punishment.[7] Yet it is entirely possible that

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"THE COURT: Do you have a fixed opinion against capital or penitentiary punishment?

"MR. MOON: Capital punishment.

"THE COURT: You mean you would never inflict the death penalty on [*sic*] any case?

"MR. MOON: That's right.

"MR. HUNDLEY: Challenge.

"THE COURT: Defendant?

"MR. CHENAULT: No questions.

"THE COURT: Stand aside, Mr. Moon."

[7] "THE COURT: What is your position on capital punishment or penitentiary punishment?

"MR. COLLIER: I don't believe in capital punishment.

"THE COURT: State?

"MR. HUNDLEY: Challenge.

"THE COURT: Any questions, Mr. Chenault?

"MR. CHENAULT: No questions.

"THE COURT: You are excused. . . .

. . . .

"MR. PATTON: . . . and I don't believe in capital punishment.

"MR. HUNDLEY: I'll challenge Mr. Patton on that answer, on the ground he doesn't believe in capital punishment.

"THE COURT: Any questions by the defendant?

"MR. CHENAULT: No questions.

"THE COURT: We . . . will let you stand aside."

As the initial portion of this colloquy and that set out in foot-a person who has "a fixed opinion against" or who does not "believe in" capital punishment might nevertheless be perfectly able as a juror to abide by existing law—to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case.

It appears, therefore, that the sentence of death imposed upon the petitioner cannot constitutionally stand under *Witherspoon* v. *Illinois*. We do not, however, finally decide that question here, for several reasons. First, the *Witherspoon* issue was not raised in the District Court, in the Court of Appeals,[8] or in the petition for certiorari filed in this Court. A further hearing directed to the issue might conceivably modify in some fashion the conclusion so strongly suggested by the record now before us. Further, it is not clear whether the petitioner has exhausted his state remedies with respect to this issue. Finally, in the event it turns out, as now appears, that relief from this death sentence must be ordered, a local federal court will be far better equipped than are we to frame an appropriate decree with due regard to available Alabama procedures.

Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded to the District Court,

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note 6 indicate, Alabama law also authorizes the exclusion of any potential juror who has a "fixed opinion against . . . penitentiary" punishment. Ala. Code, Tit. 30, § 57. Two veniremen were excused when they merely responded affirmatively to the disjunctively phrased question whether they had "a fixed opinion against capital or penitentiary punishment." It is thus not possible to discern from the record which type of punishment they objected to, although the more likely assumption would be that it was capital punishment. We did not in *Witherspoon* pass upon the validity of the "penitentiary" analogue to death-qualification of jurors, and we intimate today no opinion regarding that question.

[8] The Court of Appeals' decision was rendered prior to our decision in *Witherspoon*.

where the issue that has belatedly been brought to our attention may be properly and fully considered.

It is so ordered.

MR. JUSTICE BLACK, while still adhering to his dissent in *Witherspoon* v. *Illinois,* 391 U. S. 510, 532, acquiesces in the Court's judgment and opinion.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN, whom THE CHIEF JUSTICE and MR. JUSTICE MARSHALL join, concurring in part and dissenting in part.

I agree that the case must be remanded to the District Court for a determination of the *Witherspoon* question, and I therefore join in Part II of the Court's opinion. However, I believe that on remand the District Court should also consider an aspect of petitioner's coerced confession claim which the opinions in the two courts below completely ignore, and to which this Court pays only passing attention.

The Court states that "[t]wo confessions were in fact obtained, although only the second was actually introduced into evidence." *Ante,* at 479, n. 1. The first of these was obtained during several hours of interrogation in the Limestone County jail on the night of petitioner's arrest, May 1, 1964. The second was obtained during petitioner's re-enactment of the crime on May 6. The courts below examined the circumstances in which both confessions were obtained, and concluded that both were voluntary. In my opinion this does not exhaust the coerced confession issue.

As the Court is compelled to recognize, petitioner made inculpatory statements on, not two, but *three* different occasions. The first of these was on the *after-*

noon of May 1, preceding the interrogation at the jail.[1] On that afternoon, petitioner was apprehended by law enforcement officers near the scene of the crime. According to petitioner, an officer of the Highway Patrol approached him and asked his name:

> "I told him; then he told me to run because he had been wanting to kill him a nigger a long time . . . . [H]e told me to run, and then he throwed the rifle up like he was getting ready to shoot there." Record Transcript 539–540.

Petitioner was taken to the scene of the crime, where he was placed, in handcuffs, in a police car alone with Highway Patrol Captain Williams. He was not given any of the *Miranda* warnings.[2] As petitioner related:

> "Captain Williams asked me what had happened, and I started to tell him; he cussed me and told

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[1] This appears not only from petitioner's and respondent's oral evidence at the habeas corpus hearing, but also from the transcript of the interrogation of the night of May 1, in which Captain Williams stated:

"Billy, now you understand what we are doing, we just want to talk to you, want you to tell us the truth about everything that happened today. *Now you know you talked with me today in the car and I just want you to repeat it all for Lt. Watts here . . . .*" Appendix 57. (Emphasis added.)

[2] "The review of voluntariness in cases in which the trial was held prior to our decisions in *Escobedo* and *Miranda* is not limited in any manner by these decisions. On the contrary, that a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as is now required by *Miranda*, is a significant factor in considering the voluntariness of statements later made. . . . Thus, the fact that Davis was never effectively advised of his rights gives added weight to the other circumstances described below which made his confessions involuntary." *Davis* v. *North Carolina*, 384 U. S. 737, 740–741 (1966).

It may additionally be noted that petitioner in the present case was a slight, sickly youth, with an I. Q. of 83.

> me it wasn't . . . . I told Captain Williams I didn't do it, and he told me that I did . . . and he told me I was lying again. And he got mad and start cussing. . . . Well, he called me a little bastard and few more names . . . . Then he told me about if I didn't confess, that the officers that was wanting to kill me, he wasn't going to stop them. . . . I told him if he would get me out of there and wouldn't let them bother me, I would confess."

Later, two other officers got into the back of the car. One of them "asked me how old I was, and I told him, and he told me I was old enough to die." Record Transcript 544.

There were about 15 or 20 officers at the scene, some of whom were armed with rifles and shotguns. Captain Williams testified that a "pretty good size crowd" was gathering—"I would say, in my best judgment, twenty-five or thirty cars . . . and people milling around out in the road." Record Transcript 647–648. It was under these circumstances that petitioner first admitted to Captain Williams that he had committed the crime.

Apparently because of the hostile crowd, petitioner was finally carried away from the area in a convoy of three cars; he was taken to a jail in another county as a precautionary measure. Thereafter he made what the courts have treated as the "first" confession.

The District Court was not, of course, obliged to credit petitioner's testimony concerning the officers' threats—some of which, but by no means all, was controverted by respondent's witnesses. But the court did not even address itself to the testimony. Indeed, except for the oblique statement that "[t]here was no evidence . . . that the protection afforded Boulden on this occasion was inadequate," 257 F. Supp. 1013, 1014 (1966); 385 F. 2d 102, 104 (1967), neither of the courts below alluded to, let alone examined, the circumstances or the factual and legal consequences of the events occurring on the afternoon of May 1, 1964.[3]

Without speculating as to the possible explanations for this disturbing lacuna in the opinions below, I would broaden the remand of this case so as to allow the District Court to consider whether petitioner was subjected to improper coercion on the afternoon of May 1, and what effect the events of that afternoon had on the voluntariness of the confession introduced into evidence at petitioner's trial. See *Darwin* v. *Connecticut,* 391 U. S. 346 (1968); *id.,* at 350 (separate opinion).

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[3] In dissenting from the denial of rehearing *en banc,* Judge Tuttle, joined by Chief Judge Brown, focused on this issue:

"It is clear that there was an illegal interrogation and inculpatory statement obtained from this prisoner immediately following the shooting and it is clear beyond doubt that in the eliciting of the confession subsequently admitted by the State Court as a valid confession, much stress was placed by the officers on the fact that Boulden had already confessed under the circumstances which I find completely impermissible. . . . Here, it is clear beyond doubt that what has been held to be a legal confession was obtained by the officers repeatedly calling the accused's attention to the fact that he had already made sufficiently damaging statements and that they merely wanted him to fill in the details." 395 F. 2d 169 (1968).

GREGG *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 453. Argued February 25, 1969.—Decided April 2, 1969.

Petitioner argues that his conviction for jeopardizing the lives of postal custodians while robbing them should be reversed because the trial judge read the presentence report before the jury returned its verdict, in violation of Fed. Rule Crim. Proc. 32. This contention is rejected. There is no direct evidence in the record that the trial judge read the report before the jury's verdict was delivered. Moreover, there was no prejudice to petitioner's rights, since even if the judge read the report after the jury retired and before it returned the verdict, he could not have affected the jury prior to the verdict; the 25-year sentence was mandated by the statute; and the information in the presentence report had been revealed to the judge in an earlier psychiatric report. Pp. 491–494.

Affirmed.

Dean E. Richards, by appointment of the Court, 393 U. S. 1010, argued the cause for petitioner. With him on the briefs were *James Manahan* and *Palmer K. Ward.*

Sidney M. Glazer argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Wilson, Peter L. Strauss,* and *Beatrice Rosenberg.*

MR. JUSTICE WHITE delivered the opinion of the Court.

One afternoon, petitioner and another man robbed the post office at Louisville, Kentucky, at gunpoint. Two women were in charge of the post office, which had just closed, and petitioner warned them: "One false move out of you, I'll blow your brains out." They were then tied and gagged. A week later a bank in Indiana was robbed. Petitioner, found hiding in a motel closet with a pistol, and money orders stolen from the post office, was arrested for the bank robbery. After a one-day trial and 18 minutes of jury deliberation, petitioner was convicted of jeopardizing the lives of the postal custodians while robbing them.[1] The offense carries a mandatory sentence of 25 years.

Immediately after the jury returned its verdict the jurors were polled and the judge, noting the mandatory 25-year sentence, invited petitioner and his lawyer to exercise the right of allocution. Both asked that petitioner be allowed to spend a few days with his family before commencing to serve the sentence. The judge refused, and counsel for petitioner asked that a presentence investigation be made. The judge interrupted:

> "A pre-sentence investigation has been made. It is before me now, and I have read it. It shows a juvenile record. It shows in 1960 this defendant stole an automobile in violation of the Dyer Act and was given an indeterminate youth commitment sentence. He was paroled in 1965. He was returned—no, he was paroled in '62, returned as a parole violator in '65 and was not released full time until May of last year.
>
> "I am also informed that he was convicted of armed robbery in Yuma, Arizona, and given from seven to ten years. Several warrants are now pending against him for robbery with which he is charged."

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[1] "Whoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years." 18 U. S. C. § 2114.

Petitioner seeks a reversal of his conviction, asserting as his sole substantial argument that this record reveals that the trial judge had read the presentence report before the jury returned its verdict, in violation of Rule 32 of the Federal Rules of Criminal Procedure.[2]

Rule 32 is explicit. It asserts that the "report shall not be submitted to the court . . . unless the defendant has pleaded guilty or has been found guilty." This language clearly permits the preparation of a presentence report before guilty plea or conviction[3] but it is equally clear that the report must not, under any circumstances, be "submitted to the court" before the defendant pleads guilty or is convicted. Submission of the report to the court before that point constitutes error of the clearest kind.

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[2] "(a) *Sentence.*

"(1) *Imposition of Sentence.* Sentence shall be imposed without unreasonable delay. . . .

. . . . .

"(c) *Presentence Investigation.*

"(1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

"(2) *Report.* The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government."

. . . . .

[3] The history of the rule confirms this interpretation. The first Preliminary Draft of the rule would have required the consent of the defendant or his attorney to commence the investigation before the determination of guilt. Advisory Committee on Rules of Criminal Procedure, Fed. Rules Crim. Proc., Preliminary Draft 130, 133 (1943). The Second Preliminary Draft omitted this require-

Moreover, the rule must not be taken lightly. Presentence reports are documents which the rule does not make available to the defendant as a matter of right. There are no formal limitations on their contents, and they may rest on hearsay and contain information bearing no relation whatever to the crime with which the defendant is charged. To permit the *ex parte* introduction of this sort of material to the judge who will pronounce the defendant's guilt or innocence or who will preside over a jury trial would seriously contravene the rule's purpose of preventing possible prejudice from premature submission of the presentence report. No trial judge, therefore, should examine the report while the jury is deliberating since he may be called upon to give further instructions or answer inquiries from the jury, in which event there would be the possibility of prejudice which Rule 32 intended to avoid. Although the judge may have that information at his disposal in order to give a defendant a sentence suited to his particular character and potential for rehabilitation, there is no reason for him to see the document until the occasion to sentence arises, and under the rule he must not do so.

However, on the facts of this case, it does not emerge with sufficient clarity that Rule 32 was violated, and

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ment and imposed no limitation on the time when the report could be made and submitted to the court. Advisory Committee on Rules of Criminal Procedure, Fed. Rules Crim. Proc., Second Preliminary Draft 126–128 (1944). The third and final draft, which was adopted as Rule 32, was evidently a compromise between those who opposed any time limitation, and those who preferred that the entire investigation be conducted after determination of guilt. See 5 L. Orfield, Criminal Procedure Under the Federal Rules § 32.2 (1967).

we therefore affirm the judgment below. The trial judge did not state that he read the presentence report before the jury verdict was delivered, nor is there any direct evidence in this record that he did. Only a few minutes had elapsed between the delivery of the jury verdict and his statement that he had the report before him and had read it. But only a very short time was needed to read the well-organized five-page report, which was largely in widely spaced tabular form. It is entirely possible that the practice was followed of handing the report from the probation officer to the court just as the jury's verdict was delivered.

We also take note of the very special circumstances appearing in this case. Even if this record revealed that the judge had read the presentence report after the jury retired and before the return of the verdict, the judge could not have infected the jury with anything he learned from the report since there was no necessity or occasion for communicating with the jury once it began its deliberations, and the jury delivered its verdict immediately upon emerging from seclusion. Moreover, the judge had no discretion whatever in sentencing since the statute prescribed a 25-year sentence; and the only question before him was whether petitioner should be put on probation. Aside from the information about this particular crime which was developed at trial, the judge had had occasion to study a comprehensive psychiatric report on petitioner in determining his competence to stand trial. Every item of information to which the trial judge adverted in sentencing had been revealed to him in the psychiatric report. Moreover, the psychiatric report was three times as long as the presentence report, which was in every material respect a condensation of the psychiatric report. It must have been apparent at a glance to the trial judge that the presentence report contained no new information, and his decision to refuse probation was amply supported by what he had heard at trial and read in the psychiatric report alone. Since the brief presentence report came to the same conclusion on the basis of far less detailed information than the judge already had at his disposal, there was no occasion to study it.

We are unable to conclude from this record either that the presentence report was submitted to the court before the verdict was delivered, thus violating the letter of the rule, or that the handling of the presentence report raised any possibility of prejudice to petitioner's rights under Rule 32.

For these reasons, the judgment is

Affirmed.

FORTNER ENTERPRISES, INC. *v.* UNITED STATES STEEL CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 306. Argued January 23, 1969.—Decided April 7, 1969.

Petitioner filed this action for treble damages and injunctive relief for alleged violations of §§ 1 and 2 of the Sherman Act by respondents, U. S. Steel Corp. and its wholly owned subsidiary, U. S. Steel Homes Credit Corp., alleging an agreement between respondents to force petitioner and others as a condition of obtaining credit on advantageous terms from Credit Corp. to purchase at artificially high prices prefabricated houses manufactured by U. S. Steel. Petitioner claimed that in order for it to obtain over $2,000,000 in loans to buy and develop land in the Louisville, Ky., area it was required to agree to erect a U. S. Steel-fabricated house on each of the lots it bought with the loan proceeds. On the basis of its complaint and affidavits and answers to interrogatories filed in the course of pretrial proceedings, petitioner claimed that during the 1959–1962 period involved petitioner could find no other financing in the Louisville area at such cheap terms and on the 100% basis that Credit Corp. offered. The District Court, holding that petitioner's allegations had raised no question of fact as to a possible violation of the antitrust laws, entered summary judgment for respondents. The Court of Appeals affirmed. *Held:*

1. The District Court incorrectly assumed that the standards in *Northern Pacific R. Co.* v. *United States,* 356 U. S. 1, for determining the illegality *per se* of a tying agreement had to be met before petitioner could prevail on the merits. Pp. 498–500.

2. In any event the facts raised by petitioner, if proved at trial, make the *per se* doctrine applicable to the tying arrangement here. Pp. 500–501.

3. The volume of commerce allegedly foreclosed was substantial when measured as it should be, not by the portion of the total accounted for by petitioner's contracts, but by the total volume of sales tied by respondents' challenged sales policy. Pp. 501–502.

4. Economic power may be inferred from the seller's ability to raise prices, or impose other burdensome terms such as a tie-in,

with respect to any appreciable number of buyers within the market and does not require (as the District Court erroneously assumed) a showing of the seller's dominance over the market for the tying product. By this standard, in view of petitioner's showing that houses comparable to U. S. Steel's were sold by its competitors for substantially less and the lack of financing through other sources on terms Credit Corp. made available to petitioner, petitioner should have been allowed to go to trial on the market power issue. Pp. 502–506.

5. The arrangement here, where credit is provided by one corporation on condition that a product be purchased from another corporation, and where the borrower contracts to obtain a large sum of money beyond that needed to pay the seller for the physical products purchased, is readily distinguishable from the sale of a single product on credit by an individual seller. Pp. 506–507.

6. Where credit is the source of tying leverage used to restrain competition, it is treated no differently under the antitrust laws from other goods and services. Pp. 508–509.

404 F. 2d 936, reversed and remanded.

Kenneth L. Anderson argued the cause for petitioner. With him on the briefs was *A. Scott Hamilton, Jr.*

Macdonald Flinn argued the cause for respondents. With him on the brief were *Albert F. Reutlinger, L. L. Lewis,* and *William H. Buchanan.*

MR. JUSTICE BLACK delivered the opinion of the Court.

This case raises a variety of questions concerning the proper standards to be applied by a United States district court in passing on a motion for summary judgment in a civil antitrust action. Petitioner, Fortner Enterprises, Inc., filed this suit seeking treble damages and an injunction against alleged violations of §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2. The complaint charged that respondents, United States Steel Corp. and its wholly owned subsidiary, the United States Steel Homes Credit

Corp., had engaged in a contract, combination, and conspiracy to restrain trade and to monopolize trade in the sale of prefabricated houses. It alleged that there was a continuing agreement between respondents "to force corporations and individuals, including the plaintiff, as a condition to availing themselves of the services of United States Steel Homes Credit Corporation, to purchase at artificially high prices only United States Steel Homes . . . ." Specifically, petitioner claimed that in order to obtain loans totaling over $2,000,000 from the Credit Corp. for the purchase and development of certain land in the Louisville, Kentucky, area, it had been required to agree, as a condition of the loans, to erect a prefabricated house manufactured by U. S. Steel on each of the lots purchased with the loan proceeds. Petitioner claimed that the prefabricated materials were then supplied by U. S. Steel at unreasonably high prices and proved to be defective and unusable, thus requiring the expenditure of additional sums and delaying the completion date for the development. Petitioner sought treble damages for the profits thus lost, along with a decree enjoining respondents from enforcing the requirement of the loan agreement that petitioner use only houses manufactured by U. S. Steel.

After pretrial proceedings in which a number of affidavits and answers to interrogatories were filed, the District Court entered summary judgment for respondents, holding that petitioner's allegations had failed to raise any question of fact as to a possible violation of the antitrust laws. Noting that the agreement involved here was essentially a tying arrangement, under which the purchaser was required to take a tied product—here prefabricated homes—as a condition of being allowed to purchase the tying product—here credit, the District Judge held that petitioner had failed to establish the prerequisites of illegality under our tying cases, namely sufficient market power over the tying product and foreclosure of a substantial volume of commerce in the tied product. The Court of Appeals affirmed without opinion, and we granted certiorari, 393 U. S. 820 (1968). Since we find no basis for sustaining this summary judgment, we reverse and order that the case proceed to trial.

We agree with the District Court that the conduct challenged here primarily involves a tying arrangement of the traditional kind. The Credit Corp. sold its credit only on the condition that petitioner purchase a certain number of prefabricated houses from the Homes Division of U. S. Steel. Our cases have made clear that, at least when certain prerequisites are met, arrangements of this kind are illegal in and of themselves, and no specific showing of unreasonable competitive effect is required. The discussion in *Northern Pacific R. Co.* v. *United States,* 356 U. S. 1, 5–6 (1958), is dispositive of this question:

> "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. . . .
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> ". . . Where [tying] conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed 'tying agreements serve hardly any purpose beyond the suppression of competition.' *Standard Oil Co. of California* v. *United States,* 337 U. S. 293, 305–306. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage

> in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons 'tying agreements fare harshly under the laws forbidding restraints of trade.' *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594, 606. They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected. *International Salt Co.* v. *United States,* 332 U. S. 392." (Footnote omitted.)

Despite its recognition of this strict standard, the District Court held that petitioner had not even made out a case for the jury. The court held that respondents did not have "sufficient economic power" over credit, the tying product here, because although the Credit Corp.'s terms evidently made the loans uniquely attractive to petitioner, petitioner had not proved that the Credit Corp. enjoyed the same unique attractiveness or economic control with respect to buyers generally. The court also held that the amount of interstate commerce affected was "insubstantial" because only a very small percentage of the land available for development in the area was foreclosed to competing sellers of prefabricated houses by the contract with petitioner. We think it plain that the District Court misunderstood the two controlling standards and misconceived the extent of its authority to evaluate the evidence in ruling on this motion for summary judgment.

A preliminary error that should not pass unnoticed is the District Court's assumption that the two prerequisites mentioned in *Northern Pacific* are standards that petitioner must meet in order to prevail on the merits. On the contrary, these standards are necessary only to bring into play the doctrine of *per se* illegality. Where the standards were found satisfied in *Northern Pacific,* and in *International Salt Co.* v. *United States,* 332 U. S. 392 (1947), this Court approved summary judgment *against* the defendants but by no means implied that inability to satisfy these standards would be fatal to a plaintiff's case. A plaintiff can still prevail on the merits whenever he can prove, on the basis of a more thorough examination of the purposes and effects of the practices involved, that the general standards of the Sherman Act have been violated. Accordingly, even if we could agree with the District Court that the *Northern Pacific* standards were not satisfied here, the summary judgment against petitioner still could not be entered without further examination of petitioner's general allegations that respondents conspired together for the purpose of restraining competition and acquiring a monopoly in the market for prefabricated houses. And such an examination could rarely justify summary judgment with respect to a claim of this kind, for as we said in *Poller* v. *Columbia Broadcasting,* 368 U. S. 464, 473 (1962):

> "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" (Footnote omitted.)

We need not consider, however, whether petitioner is entitled to a trial on this more general theory, for it is clear that petitioner raised questions of fact which, if proved at trial, would bring this tying arrangement within the scope of the *per se* doctrine. The requirement that a "not insubstantial" amount of commerce be involved makes no reference to the scope of any particular market or to the share of that market foreclosed by the tie, and hence we could not approve of the trial judge's conclusions on this issue even if we agreed that his definition of the relevant market was the proper one.[1] An analysis of market shares might become relevant if it were alleged that an apparently small dollar-volume of business actually represented a substantial part of the sales for which competitors were bidding. But normally the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimis,* is foreclosed to competitors by the tie, for as we said in *International Salt,* it is "unreasonable, *per se,* to foreclose competitors from any substantial market" by a tying arrangement, 332 U. S., at 396.

The complaint and affidavits filed here leave no room for doubt that the volume of commerce allegedly foreclosed was substantial. It may be true, as respondents claim, that petitioner's annual purchases of houses from U. S. Steel under the tying arrangement never exceeded

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[1] Since the loan agreements obligated petitioner to erect houses manufactured by U. S. Steel on the land acquired, the trial judge thought the relevant foreclosure was the percentage of the undeveloped land in the county that was no longer open for sites on which homes made by competing producers could be built. This apparently was an insignificant .00032%. But of course the availability of numerous vacant lots on which houses might legally be erected would be small consolation to competing producers once the economic demand for houses had been pre-empted by respondents. It seems plain that the most significant percentage figure with reference to the tied product is the percentage of annual sales of houses, or prefabricated houses, in the area that was foreclosed to other competitors by the tying arrangement.

$190,000, while more than $500,000 in annual sales was involved in the tying arrangement held illegal in *International Salt,* but we cannot agree with respondents that a sum of almost $200,000 is paltry or "insubstantial." In any event, a narrow focus on the volume of commerce foreclosed by the particular contract or contracts in suit would not be appropriate in this context. As the special provision awarding treble damages to successful plaintiffs illustrates, Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured but also to vindicate the important public interest in free competition. See *Perma Life Mufflers* v. *International Parts Corp.,* 392 U. S. 134, 138–139 (1968). For purposes of determining whether the amount of commerce foreclosed is too insubstantial to warrant prohibition of the practice, therefore, the relevant figure is the total volume of sales tied by the sales policy under challenge, not the portion of this total accounted for by the particular plaintiff who brings suit. In *International Salt* the $500,000 total represented the volume of tied sales to all purchasers, and although this amount was directly involved because the case was brought by the Government against the practice generally, the case would have been no less worthy of judicial scrutiny if it had been brought by one individual purchaser who accounted for only a fraction of the $500,000 in tied sales. In the present case, the annual sales allegedly foreclosed by respondents' tying arrangements throughout the country totaled almost $4,000,000 in 1960, more than $2,800,000 in 1961, and almost $2,300,000 in 1962. These amounts could scarcely be regarded as insubstantial.

The standard of "sufficient economic power" does not, as the District Court held, require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market. See, *e. g., International Salt; Northern Pacific; United States* v. *Loew's Inc.,* 371 U. S. 38 (1962). As we said in the *Loew's* case, 371 U. S., at 45: "Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes."

These decisions rejecting the need for proof of truly dominant power over the tying product have all been based on a recognition that because tying arrangements generally serve no legitimate business purpose that cannot be achieved in some less restrictive way, the presence of any appreciable restraint on competition provides a sufficient reason for invalidating the tie. Such appreciable restraint results whenever the seller can exert some power over some of the buyers in the market, even if his power is not complete over them and over all other buyers in the market. In fact, complete dominance throughout the market, the concept that the District Court apparently had in mind, would never exist even under a pure monopoly. Market power is usually stated to be the ability of a single seller to raise price and restrict output, for reduced output is the almost inevitable result of higher prices. Even a complete monopolist can seldom raise his price without losing some sales; many buyers will cease to buy the product, or buy less, as the price rises. Market power is therefore a source of serious concern for essentially the same reason, regardless of whether the seller has the greatest economic power possible or merely some lesser degree of appreciable economic power. In both instances, despite the freedom of some or many buyers from the seller's power, other buyers—whether few or many, whether scattered throughout the market or part of some group within the market—

can be forced to accept the higher price because of their stronger preferences for the product, and the seller could therefore choose instead to force them to accept a tying arrangement that would prevent free competition for their patronage in the market for the tied product. Accordingly, the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market.

The affidavits put forward by petitioner clearly entitle it to its day in court under this standard. A construction company president stated that competitors of U. S. Steel sold prefabricated houses and built conventional homes for at least $400 less than U. S. Steel's price for comparable models. Since in a freely competitive situation buyers would not accept a tying arrangement obligating them to buy a tied product at a price higher than the going market rate, this substantial price differential with respect to the tied product (prefabricated houses) in itself may suggest that respondents had some special economic power in the credit market. In addition, petitioner's president, A. B. Fortner, stated that he accepted the tying condition on respondents' loan solely because the offer to provide 100% financing, lending an amount equal to the full purchase price of the land to be acquired, was unusually and uniquely advantageous to him. He found that no such financing was available to his corporation on any such cheap terms from any other source during the 1959–1962 period. His views on this were supported by the president of a finance company in the Louisville area, who stated in an affidavit that the type of advantageous financing plan offered by U. S. Steel "was not available to Fortner Enterprises or any other potential borrower from or through Louisville Mortgage Service Company or from or through any other lending institution or mortgage company to this affiant's knowledge during this period."

We do not mean to accept petitioner's apparent argument that market power can be inferred simply because the kind of financing terms offered by a lending company are "unique and unusual." We do mean, however, that uniquely and unusually advantageous terms can reflect a creditor's unique economic advantages over his competitors.[2] Since summary judgment in antitrust cases is disfavored, *Poller, supra,* the claims of uniqueness in this case should be read in the light most favorable to petitioner. They could well mean that U. S. Steel's subsidiary Credit Corp. had a unique economic ability to provide 100% financing at cheap rates. The affidavits show that for a three-to-four-year period no other financial institution in the Louisville area was willing to match the special credit terms and rates of interest available from U. S. Steel. Since the possibility of a decline in property values, along with the difficulty of recovering full market value in a foreclosure sale, makes it desirable for a creditor to obtain collateral greater in value than the loan it secures, the unwillingness of competing financial institutions in the area to offer 100% financing probably reflects their feeling that they could not profitably lend money on the risks involved. U. S. Steel's subsidiary Credit Corp., on the other hand, may well have had a substantial competitive advantage in providing this type of financing because of economies resulting from the nationwide character of its operations. In addition, potential competitors such as banks and savings and loan associations may have been prohibited from offering 100% financing by state or federal law.[3] Under these circumstances the pleadings and affidavits sufficiently disclose the possibility of market power over borrowers in the credit market to entitle petitioner to go to trial on this issue.

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[2] Uniqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product themselves. Such barriers may be legal, as in the case of patented and copyrighted products, *e. g., International Salt; Loew's,* or physical, as when the product is land, *e. g., Northern Pacific.* It is true that the barriers may also be economic, as when competitors are simply unable to produce the distinctive product profitably, but the uniqueness test in such situations is somewhat confusing since the real source of economic power is not the product itself but rather the seller's cost advantage in producing it.

It may also be, of course, that these allegations will not be sustained when the case goes to trial. It may turn out that the arrangement involved here serves legitimate business purposes and that U. S. Steel's subsidiary does not have a competitive advantage in the credit market. But on the record before us it would be impossible to reach such conclusions as a matter of law, and it is not our function to speculate as to the ultimate findings of fact. We therefore conclude that the showing made by petitioner was sufficient on the market power issue.

Brief consideration should also be given to respondents' additional argument that even if their unique kind of financing reflected economic power in the credit market, and even if a substantial volume of commerce was affected, the arrangement involving credit should not be held illegal under normal tie-in principles. In support of this, respondents suggest that every sale on credit in effect involves a tie. They argue that the offering of favorable credit terms is simply a form of price competition equivalent to the offering of a comparable reduction in the cash price of the tied product. Consumers should not, they say, be deprived of such advantageous services, and they suffer no harm because they can buy the tangible product with credit obtained elsewhere if the combined price of the seller's credit-product package is less favorable than the cost of purchasing the components separately.

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[3] See, *e. g.*, Federal Reserve Act § 24, 38 Stat. 273, as amended, 12 U. S. C. § 371; 12 CFR § 545.6–14 (c).

All of respondents' arguments amount essentially to the same claim—namely, that this opinion will somehow prevent those who manufacture goods from ever selling them on credit. But our holding in this case will have no such effect. There is, at the outset of every tie-in case, including the familiar cases involving physical goods, the problem of determining whether two separate products are in fact involved. In the usual sale on credit the seller, a single individual or corporation, simply makes an agreement determining when and how much he will be paid for his product. In such a sale the credit may constitute such an inseparable part of the purchase price for the item that the entire transaction could be considered to involve only a single product. It will be time enough to pass on the issue of credit sales when a case involving it actually arises. Sales such as that are a far cry from the arrangement involved here, where the credit is provided by one corporation on condition that a product be purchased from a separate corporation,[4] and where the borrower contracts to obtain a large sum of money over and above that needed to pay the seller for the physical products purchased. Whatever the standards for determining exactly when a transaction involves only a "single product," we cannot see how an arrangement such as that present in this case could ever be said to involve only a single product.

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[4] Cf. *Perma Life Mufflers*, 392 U. S., at 141–142; *Timken Co.* v. *United States*, 341 U. S. 593, 598 (1951); *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211, 215 (1951); *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 227 (1947).

Nor does anything in respondents' arguments serve to distinguish credit from other kinds of goods and services, all of which may, when used as tying products, extend the seller's economic power to new markets and foreclose competition in the tied product. The asserted business justifications for a tie of credit are not essentially different from the justifications that can be advanced when the tying product is some other service or commodity. Although advantageous credit terms may be viewed as a form of price competition in the tied product, so is the offer of any other tying product on advantageous terms. In both instances, the seller can achieve his alleged purpose, without extending his economic power, by simply reducing the price of the tied product itself.[5]

The potential harm is also essentially the same when the tying product is credit. The buyer may have the choice of buying the tangible commodity separately, but as in other cases the seller can use his power over the tying product to win customers that would otherwise have constituted a market available to competing producers of the tied product. "[C]ompetition on the merits with respect to the tied product is inevitably curbed." *Northern Pacific,* 356 U. S., at 6. Nor can it be assumed that because the product involved is money needed to finance a purchase, the buyer would not have been able to purchase from anyone else without the seller's attractive credit. A buyer might have a strong preference for a seller's credit because it would eliminate the need for him to lay out personal funds, borrow from relatives, put up additional collateral, or obtain guarantors, but any of these expedients might have been chosen to finance a purchase from a competing producer if the seller had not captured the sale by means of his tying arrangement.

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[5] Where price reductions on the tied product are made difficult in practice by the structure of that market, the seller can still achieve his alleged objective by offering other kinds of fringe benefits over which he has no economic power.

In addition, barriers to entry in the market for the tied product are raised since, in order to sell to certain buyers, a new company not only must be able to manufacture the tied product but also must have sufficient financial strength to offer credit comparable to that provided by larger competitors under tying arrangements. If the larger companies have achieved economies of scale in their credit operations, they can of course exploit these economies legitimately by lowering their credit charges to consumers who purchase credit only, but economies in financing should not, any more than economies in other lines of business, be used to exert economic power over other products that the company produces no more efficiently than its competitors.

For all these reasons we can find no basis for treating credit differently in principle from other goods and services. Although money is a fungible commodity—like wheat or, for that matter, unfinished steel—credit markets, like other markets, are often imperfect, and it is easy to see how a big company with vast sums of money in its treasury could wield very substantial power in a credit market. Where this is true, tie-ins involving credit can cause all the evils that the antitrust laws have always been intended to prevent, crippling other companies that are equally, if not more, efficient in producing their own products. Therefore, the same inquiries must be made as to economic power over the tying product and substantial effect in the tied market, but where these factors are present no special treatment can be justified solely because credit, rather than some other product, is the source of the tying leverage used to restrain competition.

The judgment of the Court of Appeals is reversed, and the case is remanded with directions to let this suit proceed to trial.

Reversed and remanded.

MR. JUSTICE WHITE, with whom MR. JUSTICE HARLAN joins, dissenting.

The judicially developed proscription of certain kinds of tying arrangements has been commonly understood to be this: an antitrust defendant who ties the availability of one product to the purchase of another violates § 1 of the Sherman Act if he both has sufficient market power in the tying product and affects a substantial quantity of commerce in the tied product. This case further defines the degree of market power which is sufficient to invoke the tying rule. Prior cases provide some guidance but are not dispositive. Admittedly, monopoly power or dominance in the tying market, *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594, 608–611 (1953), is not necessary; it is enough if there is "sufficient economic power to impose an appreciable restraint on free competition in the tied product," *Northern Pacific R. Co.* v. *United States,* 356 U. S. 1, 11 (1958). The Court indicated in *United States* v. *Loew's Inc.,* 371 U. S. 38, 45 (1962), that this could be inferred from "the tying product's desirability to consumers or from uniqueness in its attributes."

The Court does not purport to abandon the general rule that some market power in the tying product is essential to a § 1 violation. But it applies the rule to permit proscription of a seller's extension of favorable credit terms conditioned on the purchase of an agreed quantity of the seller's product without any offer of proof that the seller has any market power in the credit market itself. Although the credit extended was for the purchase and development of land on which the purchased houses were to be built, the Court's logic dictates the same result if unusually attractive credit terms had been offered simply for the purchase of the houses themselves. Proscription of the sale of goods on easy credit terms as an illegal tie without proof of market power in credit not only departs from established doctrine but also in my view should not be outlawed as *per se* illegal under the Sherman Act. Provision of favorable credit terms may be nothing more or less than vigorous competition in the tied product, on a basis very nearly approaching the price competition which it has always been the policy of the Sherman Act to encourage. Moreover, it is far from clear that, absent power in the credit market, credit financing of purchases should be regarded as a tie of two distinct products any more than a commodity should be viewed as tied to its own price. Since provision of credit by sellers may facilitate competition, since it may provide essential risk or working capital to entrepreneurs or businessmen, and since the logic of the majority's opinion does away in practice with the requirement of showing market power in the tying product while retaining that requirement in form, the majority's *per se* rule is inappropriate. I dissent.

In this case there is no offer to prove monopoly or dominance in the tying product—money. And in no sense is the money provided to petitioner unique, even though the terms on which it was furnished and was to be repaid may have been advantageous, and indeed the money itself available from no other source on equally good terms. United States Steel was principally interested in the sale of houses, and petitioner in the economical development of its housing project. Before concluding that the financing arrangements on which U. S. Steel sold its houses amounted to anything more than a price reduction on the houses, or that easy financing terms show that their provider has market power in the money market, the Court should have in mind the rationale on which the illegality of tying arrangements is based.

There is general agreement in the cases[1] and among commentators[2] that the fundamental restraint against which the tying proscription is meant to guard is the use of power over one product to attain power over another, or otherwise to distort freedom of trade and competition in the second product. This distortion injures the buyers of the second product, who because of their preference for the seller's brand of the first are artificially forced to make a less than optimal choice in the second. And even if the customer is indifferent among brands of the second product and therefore loses nothing by agreeing to use the seller's brand of the second in order to get his brand of the first,[3] such tying agreements may work significant restraints on competition in the tied product. The tying seller may be working toward a monopoly position in the tied product[4] and, even if he is not, the practice of tying forecloses other sellers of the tied product and makes it more difficult for new firms to enter that market. They must be prepared not only to match existing sellers of the tied product in price and quality, but to offset the attraction of the tying product itself. Even if this is possible through simultaneous entry into production of the tying product, entry into both markets is significantly more expensive than simple entry into the tied market, and shifting buying habits in the tied product is considerably more cumbersome and less responsive to variations in competitive offers.[5] In addition to these anticompetitive effects in the tied product, tying arrangements may be used to evade price control in the tying product through clandestine transfer of the profit to the tied product;[6] they may be used as a counting device to effect price discrimination;[7] and they may be used to force a full line of products on the customer[8] so as to extract more easily from him a monopoly return on one unique product in the line.[9]

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[1] *E. g., United States* v. *Loew's Inc.*, 371 U. S. 38, 44–45 (1962); *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 6–7 (1958); *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594, 611 (1953).

[2] *E. g.*, Report of the Attorney General's National Committee to Study the Antitrust Laws 145 (1955); Austin, The Tying Arrangement: A Critique and Some New Thoughts, 1967 Wis. L. Rev. 88; Bowman, Tying Arrangements and the Leverage Problem, 67 Yale L. J. 19 (1957); Day, Exclusive Dealing, Tying and Reciprocity—A Reappraisal, 29 Ohio St. L. J. 539, 540–541 (1968); Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv. L. Rev. 50, 60–61 (1958).

[3] Theoretically, the tie may do the tier little good unless the buyer is in that position. Even if the seller has a complete monopoly in the tying product, this is the case. The monopolist can exact the maximum price which people are willing to pay for his product. By definition, if his price went up he would lose customers. If he then refuses to sell the tying product without the tied product, and raises the price of the tied product above market, he will also lose customers. The tying link works no magic. However, difficulty in extracting the full monopoly profit without the tie, Burstein, A Theory of Full-Line Forcing, 55 Nw. U. L. Rev. 62 (1960), or the marginal advantage of a guaranteed first refusal from otherwise indifferent customers of the tied product, or other advantages mentioned in the text, may make the tie beneficial to its originator.

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[4] If the monopolist uses his monopoly profits in the first market to underwrite sales below market price in the second, his monopoly business becomes less profitable. There remains an incentive to do so nonetheless when he thinks he can obtain a monopoly in the tied product as well, permitting him later to raise prices without fear of entry to recoup the monopoly profit he has forgone. But just as the firm whose deep pocket stems from monopoly profits in the tying product may make this takeover, so may anyone else with a deep pocket, from whatever source.

[5] Even when the terms of the tie allow a competitor to obtain the business in the tied product simply by offering a price lower than, rather than equal to, the tier's, the Court has found sufficient restriction in the tied product, as in the *Northern Pacific* case.

[6] Bowman, Tying Arrangements and the Leverage Problem, 67 Yale L. J. 19, 21–23 (1957).

[7] *Id.*, at 23–24.

[8] Burstein, A Theory of Full-Line Forcing, 55 Nw. U. L. Rev. 62 (1960).

All of these distortions depend upon the existence of some market power in the tying product quite apart from any relationship which it might bear to the tied product. In this case, what proof of any market power in the tying product has been alleged? Only that the tying product—money—was not available elsewhere on equally good terms, and perhaps not at all. Let us consider these possibilities in turn.

First, if enough money to proceed was available elsewhere and U. S. Steel was simply offering credit at a lower price, in terms of risk of loss, repayment terms, and interest rate, surely this does not establish that U. S.

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[9] Tie-ins may also at times be beneficial to the economy. Apart from the justifications discussed in the text are the following. They may facilitate new entry into fields where established sellers have wedded their customers to them by ties of habit and custom. *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 330 (1962); Note, Newcomer Defenses: Reasonable Use of Tie-ins, Franchises, Territorials, and Exclusives, 18 Stan. L. Rev. 457 (1966). They may permit clandestine price cutting in products which otherwise would have no price competition at all because of fear of retaliation from the few other producers dealing in the market. They may protect the reputation of the tying product if failure to use the tied product in conjunction with it may cause it to misfunction. Compare *International Business Machines Corp.* v. *United States,* 298 U. S. 131, 138–140 (1936), and *Standard Oil Co.* v. *United States,* 337 U. S. 293, 306 (1949), with *Pick Mfg. Co.* v. *General Motors Corp.,* 80 F. 2d 641 (C. A. 7th Cir. 1935), aff'd, 299 U. S. 3 (1936). And, if the tied and tying products are functionally related, they may reduce costs through economies of joint production and distribution. These benefits which may flow from tie-ins, though perhaps in some cases a potential basis for an affirmative defense, were not sufficient to avoid the imposition of a *per se* proscription, once market power has been demonstrated. But in determining whether even the market-power requirement should be eliminated, as the logic of the majority opinion would do, extending the *per se* rule to absolute dimensions, the fact that tie-ins are not entirely unmitigated evils should be borne in mind.

Steel had market power by any measure in the money market. There was nothing unique about U. S. Steel's money except its low cost to petitioner. A low price on a product is ordinarily no reflection of market power. It proves neither the existence of such power nor its absence, although absence of power may be the more reasonable inference. One who has such power benefits from it precisely because it allows him to raise prices, not lower them, and ordinarily he does so.

A low price in the tying product—money, the most fungible item of trade since it is by definition an economic counter—is especially poor proof of market power when untied credit is available elsewhere. In that case, the low price of credit is functionally equivalent to a reduction in the price of the houses sold. Since the buyer has untied credit available elsewhere, he can compare the houses-credit package of U. S. Steel as competitive with the price of the untied credit plus the cost of houses from another source. By cutting the price of his houses, a competitor of U. S. Steel can compete with U. S. Steel houses on equal terms since U. S. Steel's money is no more desirable to the purchaser than money from another source except in point of price. The same money which U. S. Steel is willing to risk or forgo by providing better credit terms it could sacrifice by cutting the price of houses. There is no good reason why U. S. Steel should always be required to make the price cut in one form rather than another, which its purchaser prefers.

Provision of credit financing by the seller of a commodity to its buyer is a very common event in the American economy. Often the seller is not willing to supply credit generally for the business and personal needs of the public at large, but restricts his credit to the purchasers of the commodity which he is principally in the business of selling. In all such cases, the commodity may be viewed as tied to the credit. In all such cases, the money itself is no more desirable from one source than from another. But in all such cases, under the majority opinion, the mere fact that the credit is offered on uniquely advantageous terms makes the transaction a *per se* violation of § 1 of the Sherman Act. And so long as the buyer has chosen to accept the seller's credit terms over any others available to him, the buyer, like petitioner here, must have viewed them as uniquely advantageous to him. The logic of the majority opinion, then, casts great doubt on credit financing by sellers. I would not proscribe credit financing by sellers who had no independently demonstrable power in the credit market. Unlike the majority, I am unable to read petitioner's affidavits, the fruit of years of pretrial discovery, to offer any independent proof whatever of such market power.[10]

Second, adopting the other assumption, that sufficient credit to go forward with the enterprise was simply unavailable to petitioner from any other source at all, the result in this case is even worse. Were it not for the credit extended by U. S. Steel, petitioner would have been unable to carry out its development. U. S. Steel would not have foreclosed anyone from selling houses to petitioner since no one would have sold any houses to petitioner. A seller who is willing to take credit risks which no one else finds acceptable is simply engaging in the hard and risky competition which it is the policy of the Sherman Act to encourage. And if he may not do so, then those businesses and entrepreneurs who depend for their survival and growth or for the initiation of new enterprises on the availability of credit financing from sellers may well fail for lack of credit availability from other sources. Of course, if the credit was unavailable elsewhere because U. S. Steel was a monopolist of credit in a relevant market—which petitioner does not assert—the tie would be illegal. But here it was evidently unavailable elsewhere simply because others were not willing to match U. S. Steel's relatively low price for acceptance of high risk.

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[10] I agree with the majority that the affidavits are not *inconsistent* with a "possibility of market power" and that such power might be shown by showing certain kinds of "unique economic ability." But I cannot see how petitioner offers to prove this, although by taking judicial notice of the possibility that U. S. Steel may have operated free of legal restraints on other lenders otherwise willing to provide 100% financing—a possibility not mentioned by petitioner—the majority suggests to petitioner an element of the sort of detailed description of one facet of the credit market which, with much more information about the whole of the market, would be relevant. But this was not the basis on which petitioner offered to go to trial and I would not remand for trial even under the applicable *Poller* standard.

Neither petitioner nor the Court asserts that under prior antitrust doctrine U. S. Steel would have violated § 1 of the Sherman Act or § 3 of the Clayton Act[11] if it had simply contracted to supply all the houses Fortner required to develop the particular tract of land involved here—a requirements contract for the development—even if the price for the houses was particularly advantageous. What triggers the application of the antitrust laws is the asserted tying arrangement, the sale of one product conditioned on the purchase of another. And it is not all tying transactions in general but only those where leverage in one market has been used to distort another which so far have been held illegal restraints of trade. The basis for the rule is clear where the seller is dominant in the tying product market, where the product is patented, or where it is in short supply. In these cases the restraint on competitors in the tied product as well as on buyers of the tying product is reasonably apparent. But I question that buyers' acceptance of the tie-in—the simple fact that there are customers—will always suffice to prove market power in the tying product. Where the seller exercises no market power in the tying item but buyers prefer the tie-in because the seller offers the tying product on favorable terms—where the price is unusually low or where the seller gives the product away conditioned on buying other merchandise—the seller in effect is merely competing in the tied product market. Buyers are not burdened. They may buy both tied and tying products elsewhere on normal terms. Nor are the seller's competitors restrained. The economic advantage of the tie-in to buyers can be matched by other sellers of the tied product by offering lower prices on that product. Promotional tie-ins effected by underpricing the tying product do not themselves prove there is any market power to exercise in that product market, unless the economic resources to withstand lower profit margins and the willingness to compete in this manner are themselves suspect. If they are, however, they should as surely taint and muffle hard price competition in the tied market itself, a result which, short of a § 2 violation, it would be difficult to reach under the Sherman Act.

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[11] 38 Stat. 731, 15 U. S. C. § 14.

I cannot join such a complete evisceration of the requirement that market power in the tying product be shown before a tie-in becomes illegal under § 1. Certainly it is unnecessary to erect a § 1 *per se* ban on promotional tie-ins in order to protect the tied product market. If the resulting exclusion of competitors is of sufficient significance to threaten competition in that market, the transaction may be reached as a requirements contract under § 3 of the Clayton Act.[12] If the promotional tie is in effect price discrimination, that too can be examined under statutes designed for that purpose.[13] Moreover, the transaction could be dealt with as an unfair method of competition under § 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. § 45. For example, in *Hastings Mfg. Co.* v. *FTC,* 153 F. 2d 253 (C. A. 6th Cir.), cert. denied, 328 U. S. 853 (1946), it was, *inter alia,* held an unfair method of competition for a seller of piston rings, ranking sixth or seventh in the industry, to attempt to obtain exclusive dealers or preferential dealers by guaranteeing profits to the dealers and making loans to them, tied to the purchase of the piston rings. Relying on the expertise of the FTC and the precedents of this Court, the Court of Appeals concluded that although it "is not illegal for a manufacturer to finance his retail outlets," 153 F. 2d, at 257 (a proposition called into question by today's decision) tying this to exclusive or preferential dealing was an unfair method of competition.

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[12] The arrangements proscribed by § 3 relate only to "goods, wares, merchandise, machinery, supplies, or other commodities . . . ." 38 Stat. 731, 15 U. S. C. § 14.

The principal evil at which the proscription of tying aims is the use of power in one market to acquire power in, or otherwise distort, a second market. This evil simply does not exist if there is no power in the first market. The first market here is money, a completely fungible item. I would not apply a *per se* rule here without independent proof of market power. Cutting prices in the credit market is more likely to reflect a competitive attempt to offset the market power of others in the tied product than it is to reflect existing market power in the credit market. Those with real power do not offer uniquely advantageous deals to their customers; they raise prices.

This is not, of course, to say that if market power were proved in the tying product the *per se* rule would be inapplicable, or that it is necessarily impossible to prove market power in the credit market. There may be so few suppliers of credit in a certain relevant market, for example, that they have the power among them to manipulate the price and terms of credit, not necessarily by conspiracy, but by parallel behavior. Through proof that such a situation existed, or through proof of some other sort, an antitrust plaintiff might be able to show market power in the credit market, and if this were coupled with a tie I would consider the arrangement *per se* illegal under conventional antitrust doctrine. However, I do not consider petitioner's allegations that U. S. Steel lowered its price of credit sufficient to establish market power in credit and I can find no offer by petitioner of the necessary supplementary proof.

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[13] Robinson-Patman Price Discrimination Act, 49 Stat. 1526, as amended, 15 U. S. C. § 13 *et seq.*

MR. JUSTICE FORTAS, with whom MR. JUSTICE STEWART joins, dissenting.

I share my Brother WHITE's inability to agree with the majority in this case, and, in general, I subscribe to his opinion. I add this separate statement of the reasons for my dissent.

The facts of this case are materially different from any tying case that this Court has heretofore decided. The tying doctrine originated in situations where the seller of product A offers it for sale only on the condition that the buyer also agree to buy product B from the seller. In *International Salt Co.* v. *United States,* 332 U. S. 392 (1947), for example, the company leased its patented machines on the condition that the lessee agree to use only International's salt products in the machines. In *Northern Pacific R. Co.* v. *United States,* 356 U. S. 1 (1958), the railroad leased land from its vast holdings on condition that the lessee accept "preferential routing" clauses compelling the lessee to ship on the railroad's lines all commodities produced or manufactured on the land unless another railroad offered more favorable terms.

Although the tying doctrine originated under the specific language of § 3 of the Clayton Act, *Northern Pacific* was necessarily a Sherman Act case, because the Clayton Act provision applies only to "goods, wares, merchandise, machinery, supplies, or other commodities," and not to land. But *Northern Pacific*, in effect, applied the same standards to tying arrangements under the Sherman Act as under the Clayton Act, on the theory that the anticompetitive effect of a tie-in was such as to make the difference in language in the two statutes immaterial. The present case, like *Northern Pacific,* is also exclusively a Sherman Act proceeding. But, here, U. S. Steel is not selling or leasing land subject to an agreement that its prefabricated houses be used thereon. If these were the facts, and if U. S. Steel controlled enough land within an economically demarcated area or "market," however defined, the case might well be governed by *Northern Pacific.* But, here, U. S. Steel is not selling or providing land. It is selling prefabricated steel houses to be erected in a subdivision and it is providing financing for the land acquisition, improvement, development, and erection costs. Most of the financing is related not to the land cost but to the purchase and installation of the houses.

U. S. Steel neither owned nor controlled any of the land involved in the venture. On the contrary, the building lots constituting the subdivision on which the houses were to be built were owned by another company of which the principal owner was Mr. Fortner, who owned the petitioner. Nor is U. S. Steel selling credit in any general sense. The financing which it agrees to provide is solely and entirely ancillary to its sale of houses. Under contract terms of a familiar sort in subdivision development, the credit advances are geared to progressive stages of the subdivision development and the purchase, erection, and resale of the houses.

U. S. Steel approached the petitioner seeking to sell it prefabricated steel houses to be erected on the land which Mr. Fortner's other company owned. In October 1960, after lengthy discussions, U. S. Steel offered, through its Credit Corporation, to lend petitioner about $2,000,000. This sum was to be secured by mortgages on the lots. The mortgage notes carried 6% interest, and petitioner also agreed to pay a "Service Fee" of $\frac{1}{2}$ of 1% of the principal amount of the notes. Provisions were made to insure that the funds would be progressively advanced and used for land acquisition (from Mr. Fortner's other company), for development and improvement of the area preparatory to construction, and for the purchase and erection of the houses themselves. Petitioner was obligated to erect on each lot a prefabricated house manufactured by U. S. Steel. Of the total of about $2,000,000 to be advanced, $1,700,000 was to be disbursed against purchase and installation of the houses from U. S. Steel and the balance for land acquisition and development.

The Court holds that this was a "tying" agreement, and that, therefore, the extraordinarily onerous incidents of *per se* illegality which this Court has attached to "tying" agreements must apply here as well.

I cannot agree. This is a sale of a single product with the incidental provision of financing. It is not a sale of one product on condition that the buyer will not deal with competitors for another product or will buy the other product exclusively from the seller.

As my Brother WHITE shows, to treat the financing of the housing development as a "tying" product for the houses is to distort the doctrine and to depart from the reason for its existence. Such an extension of the tying doctrine entirely departs from the factual pattern which is described in § 3 of the Clayton Act and which has been the basis of this Court's extension of the doctrine to the Sherman Act and its development of the rule that such tying arrangements are illegal on a *per se* basis—*i. e.,* without any showing that they constitute an unreasonable restraint of trade or tend to create a monopoly. The Court has established this rule because the kind of tying arrangement at issue in prior cases involved the use of a leverage position in the tying product—the patented machine, the copyrighted film, the unique land—to force the buyer to purchase the tied product. To apply this rule to a situation where the only "leverage" is a lower price for the article sold or more advantageous financing or credit terms for the article sold and for ancillary costs connected with the sale is to distort the doctrine, and, indeed, to convert it into an instrument which penalizes price competition for the article that is sold.

It is, of course, not inconceivable that a case might arise where § 1 or § 2 of the Sherman Act would outlaw a combination of sale and credit on a specific showing of market power and anticompetitive effect. It is also possible that such a combination might, in some situations, constitute "unfair methods of competition" in violation of § 5 of the Federal Trade Commission Act, or price discrimination or furnishing services on discriminatory terms, in violation of § 2 of the Clayton Act, as my Brother WHITE suggests. The majority, however, does not rely on any such analysis of the actualities of market power or anticompetitive effect, but sweeps this kind of credit arrangement within the *per se* ban.*

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*The case is remanded for trial. I find it difficult to learn from the majority opinion just what is to be determined at that trial. Some parts of the discussion suggest that petitioner must establish

The effect of this novel extension—this distortion, as I view it—of the tying doctrine may be vast and destructive. It is common in our economy for a seller to extend financing to a distributor or franchisee to enable him to purchase and handle the seller's goods at retail, to rent retail facilities, to acquire fixtures or machinery for service to customers in connection with distribution of the seller's goods, or, as here, to prepare the land for and to acquire and erect the seller's houses for sale to the public. It is hardly conceivable, except for today's opinion of the Court, that extension of such credit as a part of a general sale transaction or distribution method could be regarded as a "tying" of the seller's goods to the credit, so that where the businessman receiving the credit agrees to handle the seller-lender's product, the arrangement is *per se* unlawful merely because the amount or terms of the credit were more favorable than could be obtained from banking institutions in the area. Arrangements of this sort run throughout the economy. They frequently,

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that U. S. Steel had the market power over credit by showing facts in no way suggested at this stage by the pleadings. At another point the majority even suggests that if U. S. Steel can show "legitimate business purposes" and the absence of "competitive advantage" (*ante,* at 506) in the credit market, it will have made out a defense. But in an earlier part of the opinion, the majority says explicitly that "it is clear that petitioner raised questions of fact which, if proved at trial, would bring this tying arrangement within the scope of the *per se* doctrine." (*Ante,* at 500–501.) If it is this sentence which determines the range of issues open on remand there will be no examination at the trial of the business or economic background of the credit arrangements here attacked or of the effects, if any, of this arrangement on competition in the prefabricated house market. All petitioner will need to do is show that U. S. Steel did indeed condition the extension of its subsidiary's credit on an agreement to purchase U. S. Steel prefabricated houses and it will have demonstrated the automatic illegality of the credit arrangement.

and perhaps characteristically, represent an indispensable method of financing distributive and service trades, and not until today has it been held that they are tying arrangements and therefore *per se* unlawful. Cf. *Standard Oil Co.* v. *United States,* 337 U. S. 293, 315, 321 (1949) (separate opinion of DOUGLAS, J., and dissenting opinion of Jackson, J.).

In the present case in every respect, the provision of credit for construction of the houses and other associated costs of developing the subdivision, was, from U. S. Steel's point of view, ancillary and subordinated to the sale of the houses. The Credit Corporation did not operate at a loss, but its profit was comparatively low. Provision of special financing to the prospective purchaser of prefabricated houses by the Credit Corporation was intimately and exclusively related to the end object of the sale of the houses by the Homes Division. It was not a separate item of "sale."

This pattern is by no means limited to the provisions of financing, nor can the impact of the majority's opinion be so limited. Almost all modern selling involves providing some ancillary services in connection with making the sale—delivery, installation, supplying fixtures, servicing, training of the customer's personnel in use of the material sold, furnishing display material and sales aids, extension of credit. Customarily—indeed almost invariably—the seller offers these ancillary services only in connection with the sale of his own products, and they are often offered without cost or at bargain rates. It is possible that in some situations, such arrangements could be used to restrain competition or might have that effect, but to condemn them out-of-hand under the "tying" rubric, is, I suggest, to use the antitrust laws themselves as an instrument in restraint of competition.

For these reasons, I dissent.

KIRKPATRICK, SECRETARY OF STATE OF MISSOURI, ET AL. *v.* PREISLER ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI.

No. 30. Argued January 13, 1969.—
Decided April 7, 1969.*

Missouri's 1967 congressional redistricting statute created districts which varied from the ideal, based on 1960 census figures, by 12,260 (2.84%) below to 13,542 (3.13%) above. The District Court found that the state legislature had not relied on the census reports but used less accurate data, that it had rejected a plan with smaller variances, and that by simply switching some counties from one district to another it would have produced a plan with markedly reduced variances, and accordingly held that the statute did not meet the constitutional standard of equal representation "as nearly as practicable" and that the State failed to provide acceptable justification for the variances. *Held:*

1. Art. I, § 2, requires that States create congressional districts which provide equal representation for equal numbers of people with "only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." Pp. 530–532.

(a) The establishment of an acceptable *de minimis* variance would be arbitrary, inconsistent with the "as nearly as practicable" standard commanded by Art. I, § 2, and would encourage legislators to strive for the *de minimis* range rather than for equality. P. 531.

(b) The population variances among the Missouri congressional districts were not unavoidable. Pp. 531–532.

2. Unless population variances among the districts are shown to have resulted despite the State's good-faith effort to achieve equality, the State must justify each variance, no matter how small, and Missouri has not justified the variances here. Pp. 531, 533–536.

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*Together with No. 31, *Heinkel et al.* v. *Preisler et al.*, also on appeal from the same court.

(a) Variances based on the creation of districts with specific interest orientations are contrary to the constitutional requirement of equal representation. P. 533.

(b) Consideration of practical or partisan politics cannot justify population disparities. Pp. 533–534.

(c) Even assuming that apportionment may be based on eligible voter population rather than total population, Missouri made no serious attempt to ascertain the number of eligible voters in each district and to apportion on that basis. Pp. 534–535.

(d) Where population shifts can be accurately predicted, States may properly consider them and apply them, not as Missouri has done, but throughout the State in a systematic manner. P. 535.

(e) Claims that geographic compactness may require deviations from equality are generally unconvincing, and here Missouri's claim of compactness is based merely on the unaesthetic appearance of a congressional boundaries map that would result from changes which would achieve greater equality. Pp. 535–536.

279 F. Supp. 952, affirmed.

Thomas J. Downey, First Assistant Attorney General of Missouri, argued the cause for appellants in No. 30. With him on the briefs were *Norman H. Anderson,* Attorney General, *pro se,* and *Louren R. Wood,* Assistant Attorney General. *David Collins* argued the cause and filed a brief for appellants in No. 31.

Irving Achtenberg argued the cause for appellees in both cases. With him on the brief was *Paul W. Preisler, pro se.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

In *Wesberry* v. *Sanders,* 376 U. S. 1 (1964), we held that "[w]hile it may not be possible [for the States] to draw congressional districts with mathematical precision," *id.,* at 18, Art. I, § 2, of the Constitution requires that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id.,* at 7–8. We are required in these cases to elucidate the "as nearly as practicable" standard.

The Missouri congressional redistricting statute challenged in these cases resulted from that State's second attempt at congressional redistricting since *Wesberry* was decided. In 1965, a three-judge District Court for the Western District of Missouri declared that the Missouri congressional districting Act then in effect was unconstitutional under *Wesberry* but withheld any judicial relief "until the Legislature of the State of Missouri has once more had an opportunity to deal with the problem . . . ." *Preisler* v. *Secretary of State of Missouri,* 238 F. Supp. 187, 191. Thereafter, the General Assembly of Missouri enacted a redistricting statute, but this statute too was declared unconstitutional. The District Court, however, retained jurisdiction to review any further plan that might be enacted. *Preisler* v. *Secretary of State of Missouri,* 257 F. Supp. 953 (1966), aff'd, *sub nom. Kirkpatrick* v. *Preisler,* 385 U. S. 450 (1967). In 1967, the General Assembly enacted the statute under attack here, Mo. Rev. Stat., c. 128 (Cum. Supp. 1967), and the Attorney General of Missouri moved in the District Court for a declaration sustaining the Act and an order dismissing the case.

Based on the best population data available to the legislature in 1967, the 1960 United States census figures, absolute population equality among Missouri's 10 congressional districts would mean a population of 431,981 in each district. The districts created by the 1967 Act, however, varied from this ideal within a range of 12,260 below it to 13,542 above it. The difference between the least and most populous districts was thus 25,802. In percentage terms, the most populous district was 3.13%

above the mathematical ideal, and the least populous was 2.84% below.[1]

The District Court found that the General Assembly had not in fact relied on the census figures but instead had based its plan on less accurate data. In addition, the District Court found that the General Assembly had rejected a redistricting plan submitted to it which provided for districts with smaller population variances among them. Finally, the District Court found that the simple device of switching some counties from one district to another would have produced a plan with markedly reduced variances among districts. Based on these findings, the District Court, one judge dissenting, held that the 1967 Act did not meet the constitutional standard of equal representation for equal numbers of people "as nearly as practicable," and that the State had failed to make any acceptable justification for the variances. 279 F. Supp. 952 (1967). We noted

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[1] The redistricting effected by the 1967 Act, based on a population of 4,319,813 according to the 1960 census, is as follows:

District No.	*Population.*	*% Variation From Ideal.*
One	439,746	+ 1.80
Two	436,448	+ 1.03
Three	436,099	+ 0.95
Four	419,721	− 2.84
Five	431,178	− 0.19
Six	422,238	− 2.26
Seven	436,769	+ 1.11
Eight	445,523	+ 3.13
Nine	428,223	− 0.87
Ten	423,868	− 1.88

Ideal population per district	431,981
Average variation from ideal	1.6%
Ratio of largest to smallest district	1.06 to 1
Number of districts within 1.88% of ideal	7
Population difference between largest and smallest districts	25,802

probable jurisdiction but stayed the District Court's judgment pending appeal and expressly authorized the State "to conduct 1968 congressional elections under and pursuant to [the] 1967 . . . Act . . . ." 390 U. S. 939 (1968). We affirm.

Missouri's primary argument is that the population variances among the districts created by the 1967 Act are so small that they should be considered *de minimis* and for that reason to satisfy the "as nearly as practicable" limitation and not to require independent justification. Alternatively, Missouri argues that justification for the variances was established in the evidence: it is contended that the General Assembly provided for variances out of legitimate regard for such factors as the representation of distinct interest groups, the integrity of county lines, the compactness of districts, the population trends within the State, the high proportion of military personnel, college students, and other nonvoters in some districts, and the political realities of "legislative interplay."

I.

We reject Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the "as nearly as practicable" standard. The whole thrust of the "as nearly as practicable" approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case. The extent to which equality may practicably be achieved may differ from State to State and from district to district. Since "equal representation for equal numbers of people [is] the fundamental goal for the House of Representatives," *Wesberry* v. *Sanders, supra,* at 18, the "as nearly as practicable" standard requires that the State make a good-faith effort to achieve precise mathematical equality. See *Reynolds* v. *Sims,* 377 U. S. 533, 577 (1964). Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small.

There are other reasons for rejecting the *de minimis* approach. We can see no nonarbitrary way to pick a cutoff point at which population variances suddenly become *de minimis.* Moreover, to consider a certain range of variances *de minimis* would encourage legislators to strive for that range rather than for equality as nearly as practicable. The District Court found, for example, that at least one leading Missouri legislator deemed it proper to attempt to achieve a 2% level of variance rather than to seek population equality.

Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. Toleration of even small deviations detracts from these purposes. Therefore, the command of Art. I, § 2, that States create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.

Clearly, the population variances among the Missouri congressional districts were not unavoidable. Indeed, it is not seriously contended that the Missouri Legislature came as close to equality as it might have come. The District Court found that, to the contrary, in the two reapportionment efforts of the Missouri Legislature since *Wesberry* "the leadership of both political parties in the Senate and the House were given nothing better to work with than a makeshift bill produced by what has been candidly recognized to be no more than . . . an expedient political compromise." 279 F. Supp., at 966. Legislative proponents of the 1967 Act frankly conceded at the District Court hearing that resort to the simple device of transferring entire political subdivisions of known population between contiguous districts would have produced districts much closer to numerical equality. The District Court found, moreover, that the Missouri Legislature relied on inaccurate data in constructing the districts, and that it rejected without consideration a plan which would have markedly reduced population variances among the districts. Finally, it is simply inconceivable that population disparities of the magnitude found in the Missouri plan were unavoidable.[2] The New York apportionment plan of regions divided into districts of almost absolute population equality described in *Wells* v. *Rockefeller*, *post*, at 545–546, provides striking evidence that a state legislature which tries can achieve almost complete numerical equality among all the State's districts. In sum, "it seems quite obvious that the State could have come much closer to providing districts of equal population than it did." *Swann* v. *Adams*, 385 U. S. 440, 445 (1967).

We therefore turn to the question whether the record establishes any legally acceptable justification for the population variances. It was the burden of the State "to present . . . acceptable reasons for the variations among the populations of the various . . . districts . . . ." *Swann* v. *Adams*, *supra*, at 443–444.

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[2] Contrary to appellants' assertion, we have not sustained the constitutionality of any congressional districting plan with population variances of the magnitude found in the Missouri plan. In *Connor* v. *Johnson*, 386 U. S. 483 (1967), the only issue presented to this Court was whether the districting plan involved racial gerrymandering. *Alton* v. *Tawes*, 384 U. S. 315 (1966), and *Kirk* v. *Gong*, 389 U. S. 574 (1968), involved situations where the lower courts themselves had reapportioned the districts on an emergency basis, and our affirmances were based on agreement with the use of the plans in that circumstance, and not on any view that the plans in question achieved equality as nearly as practicable.

II.

We agree with the District Court that Missouri has not satisfactorily justified the population variances among the districts.

Missouri contends that variances were necessary to avoid fragmenting areas with distinct economic and social interests and thereby diluting the effective representation of those interests in Congress. But to accept population variances, large or small, in order to create districts with specific interest orientations is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people. "[N]either history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes." *Reynolds* v. *Sims, supra,* at 579–580. See also *Davis* v. *Mann,* 377 U. S. 678, 692 (1964).

We also reject Missouri's argument that "[t]he reasonableness of the population differences in the congressional districts under review must . . . be viewed in the context of legislative interplay. The legislative leaders all testified that the act in question was in their opinion a reasonable legislative compromise. . . . It must be remembered . . . that practical political problems are inherent in the enactment of congressional reapportionment legislation."[3] We agree with the District Court that "the rule is one of 'practicability' rather than political 'practicality.'" 279 F. Supp., at 989. Problems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster.

Similarly, we do not find legally acceptable the argument that variances are justified if they necessarily result from a State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries. The State's interest in constructing congressional districts in this manner, it is suggested, is to minimize the opportunities for partisan gerrymandering. But an argument that deviations from equality are justified in order to inhibit legislators from engaging in partisan gerrymandering[4] is no more than a variant of the argument, already rejected, that considerations of practical politics can justify population disparities.

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[3] Brief for Appellants 37–38.

Missouri further contends that certain population variances resulted from the legislature's taking account of the fact that the percentage of eligible voters among the total population differed significantly from district to district—some districts contained disproportionately large numbers of military personnel stationed at bases maintained by the Armed Forces and students in attendance at universities or colleges. There may be a question whether distribution of congressional seats except according to total population can ever be permissible under Art. I, § 2. But assuming without deciding that apportionment may be based on eligible voter population rather than total population, the Missouri plan is still unacceptable. Missouri made no attempt to ascertain the number of eligible voters in each district and to apportion accordingly. At best it made haphazard adjustments to a scheme based on total population: overpopulation in the Eighth District was explained away by the presence in that district of a military base and a university; no attempt was made to account for the presence of universities in other districts or the disproportionate numbers of newly arrived and short-term residents in the City of St. Louis. Even as to the Eighth District, there is no indication that the excess population allocated to that district corresponds to the alleged extraordinary additional numbers of noneligible voters there.

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[4] It is dubious in any event that the temptation to gerrymander would be much inhibited, since the legislature would still be free to choose which of several subdivisions, all with their own political complexion, to include in a particular congressional district. Besides, opportunities for gerrymandering are greatest when there is freedom to construct unequally populated districts. "[T]he artistry of the political cartographer is put to its highest test when he must work with constituencies of equal population. At such times, his skills can be compared to those of a surgeon, for both work under fixed and arduous rules. However, if the mapmaker is free to allocate varying populations to different districts, then the butcher's cleaver replaces the scalpel; and the results reflect sharply the difference in the method of operation." A. Hacker, Congressional Districting 59 (1964 rev. ed.).

Missouri also argues that population disparities between some of its congressional districts result from the legislature's attempt to take into account projected population shifts. We recognize that a congressional districting plan will usually be in effect for at least 10 years and five congressional elections. Situations may arise where substantial population shifts over such a period can be anticipated. Where these shifts can be predicted with a high degree of accuracy, States that are redistricting may properly consider them. By this we mean to open no avenue for subterfuge. Findings as to population trends must be thoroughly documented and applied throughout the State in a systematic, not an *ad hoc*, manner. Missouri's attempted justification of the substantial underpopulation in the Fourth and Sixth Districts falls far short of this standard. The District Court found "no evidence . . . that the . . . General Assembly adopted any policy of population projection in devising Districts 4 and 6, or any other district, in enacting the 1967 Act." 279 F. Supp., at 983.

Finally, Missouri claims that some of the deviations from equality were a consequence of the legislature's attempt to ensure that each congressional district would be geographically compact. However, in *Reynolds* v. *Sims*, *supra,* at 580, we said, "Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing." In any event, Missouri's claim of compactness is based solely upon the unaesthetic appearance of the map of congressional boundaries that would result from an attempt to effect some of the changes in district lines which, according to the lower court, would achieve greater equality. A State's preference for pleasingly shaped districts can hardly justify population variances.

Affirmed.

[For dissenting opinion of MR. JUSTICE HARLAN, see *post,* p. 549.]

[For dissenting opinion of MR. JUSTICE WHITE, see *post,* p. 553.]

MR. JUSTICE FORTAS, concurring.

I concur in the judgment of the Court in these cases, but I cannot subscribe to the standard of near-perfection which the Court announces as obligatory upon state legislatures facing the difficult problem of reapportionment for congressional elections.

In *Wesberry* v. *Sanders,* 376 U. S. 1 (1964), this Court recognized that "it may not be possible to draw congressional districts with mathematical precision," and it held that the Constitution requires that they be drawn so that, "as nearly as is practicable," each representative should cast a vote on behalf of the same number of people.

The Court now not only interprets "as nearly as practicable" to mean that the State is required to "make a good-faith effort to achieve precise mathematical equality," but it also requires that any remaining population disparities "no matter how small," be justified. It then proceeds to reject, *seriatim,* every type of justification that has been—possibly, every one that could be—advanced.

I agree that the state legislatures should be required to make "a good-faith effort to achieve" a result that allocates the population or the residents[1] of the State in roughly equal numbers to each district, based upon some orderly and objective method.[2] In my view, the State could properly arrive at figures for current population by taking the latest census returns and making modifications to allow for population movements since the last census (which the Court seems to find acceptable). It could also, in my opinion, discount the census figures to take account of the presence of significant transient or nonresident population in particular areas (an adjustment as to which the Court indicates doubt). If the State should proceed on some appropriate population basis such as I have suggested, producing approximately equal districts, trial courts, in my judgment, would be justified in declining to disapprove the result merely because of small disparities, in the absence of evidence of gerrymandering—the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes.

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[1] I would find it constitutionally entirely acceptable for a State to base its apportionment on numbers of residents, rather than total population, in each district at the time the districts are established. This would permit adjustments to take account, for example, of distortions resulting from large numbers of nonresidents at military installations or colleges in an area.

[2] In *Avery* v. *Midland County,* 390 U. S. 474, 495 (1968), I argued in a dissenting opinion that consideration of disparate local interests might be appropriate with respect to defining certain types of local government units exercising limited governmental powers. I noted there, however, that the same factors could not justify departing from the one man, one vote theory in state legislatures—or, I might now add, congressional districts—because of the general and basic nature of the function performed.

In considering whether the State has "approximated" an equal division and allocation of the population, I sympathize with the majority's view that a *de minimis* rule of allowable disparities tends to demean in theory and in practice the constitutional objective because it suggests that it is not necessary even to aim at equality. On the other hand, to reject *de minimis* as a statement of the limits on the rule of equality should not lead us to toss aside the wise recognition of the inscrutability of fact and the imperfection of man which is implicit in the *Wesberry* standard: "as nearly as practicable." This phrase does not refer merely to arithmetical possibilities. Arithmetically, it is possible to achieve division of a State into districts of precisely equal size, as measured by the decennial census or any other population base. To carry out this theoretical possibility, however, a legislature might have to ignore the boundaries of common sense, running the congressional district line down the middle of the corridor of an apartment house or even dividing the residents of a single-family house between two districts. The majority opinion does not suggest so extreme a practical application of its teaching, and I mention it only because the example may dramatize the fallacy of inflexible insistence upon mathematical exactness, with no tolerance for reality.

Whatever might be the merits of insistence on absolute equality if it could be attained, the majority's pursuit of precision is a search for a will-o'-the-wisp. The fact is that any solution to the apportionment and districting problem is at best an approximation because it is based upon figures which are always to some degree obsolete. No purpose is served by an insistence on precision which is unattainable because of the inherent imprecisions in the population data on which districting must be based. The base to which Missouri's legislature should have adhered precisely, according to the majority, is the 1960 decennial census. The legislature's plan here under review was enacted in 1967. Assuming perfect precision for the 1960 census when taken,[3] by 1967, because of the movement of population within the State as well as in-and-out migration, substantial disparities had arisen between the real distribution of population in the State and that reflected in the 1960 census base here so zealously protected by the Court.[4]

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[3] The basic enumeration error in the census—that is the variation which would be observed between successive enumerations of the same area—is very low. Second surveys of selected areas, conducted by specially trained enumerators, produced counts varying by only about 1% for the whole population from the counts of the regular enumerators. For particular groups in the population, the variance was significantly larger. See U. S. Bureau of the Census, Evaluation and Research Program of the U. S. Censuses of Population and Housing, 1960, "Accuracy of Data on Population Characteristics as Measured by Re-interviews," Ser. ER-60, No. 4 (1964), Table 24, p. 22.

Far more significant than variations between successive enumerations are errors—virtually all undercountings—which are produced by the inherent limitations of the enumerating system. A Census Bureau estimate indicates that the 1960 census counted only 96.9% of the whole population, 3.1% of the people not being found and counted by the enumerators. Undercounting was not evenly distributed over the whole population. Instead, members of certain groups, notably young adult Negroes, were far more likely to be missed by the enumerators. For nonwhites in all age groups the census was estimated to understate the actual population by 9.5%. For young adult Negro males, undercounting reached nearly 20% for some five-year age groups. See generally, Siegel, Completeness of Coverage of the Nonwhite Population in the 1960 Census and Current Estimates, and Some Implications, Report, Conference on Social Statistics and the City (Washington, D. C., June 22–23, 1967) 13 (Heer ed., 1968). Because the heavily undercounted groups are not evenly distributed over the country, the differential rates of undercounting produce divergences between the actual relative populations of particular areas and those indicated by the census.

Nothing that I have said should be taken as indicating that I do not believe that the *Wesberry* standard requires a high degree of correspondence between the demonstrated population or residence figures and the district divisions. Nor would I fix, at least at this relatively early stage of the reapportionment effort, a percentage figure for permissible variation.[5]

In the present cases, however, I agree that the judgment of the District Court should be affirmed. The history of this reapportionment and of the legislature's failure to comply with the plain and patient directions of the three-judge District Court and the failure of the legislature to use either accurate 1960 census figures or other systematically obtained figures for all the districts—these factors strongly support the District Court's refusal to accept the Missouri plan. It is true that on the average, there was only a 1.6% variation from what the majority quaintly calls the "ideal" (meaning the 1960 census figures) and in only three of the 10 districts was there a variation of 2% or more, and it is also true that there is no finding of gerrymandering. But regardless of the possibility that variances within this range might in some situations be considered tolerable within *Wesberry*'s standard, I agree that we should sustain the District Court's rejection of the plan in light of the history of the cases and the record of the plan's preparation.

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[4] The Census Bureau has estimated that of Missouri's 114 counties, 50 lost population between 1960 and 1966, while 64 gained. The independent city of St. Louis lost 57,900, or 7.7%; St. Louis County gained 146,000 or 20.8%. Outside St. Louis City and County, the absolute change ranged from a 22,100 increase in St. Charles County to a 7,100 decrease in Dunklin County. The percentage change ranged from a 41.7% increase in St. Charles County to a 21.4% decrease in Holt County. Estimates of the Population of Counties: July 1, 1966 (Report No. 3), Current Population Reports, Population Estimates, Ser. P–25, No. 407 (Bureau of the Census, October 10, 1968) 11–13.

[5] Cf. *Reynolds* v. *Sims*, 377 U. S. 533, 578 (1964):

"For the present, we deem it expedient not to attempt to spell out any precise constitutional tests. What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment."

WELLS *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 238. Argued January 13, 1969.—Decided April 7, 1969.

New York's 1968 congressional districting statute treated seven sections of the State as homogeneous regions and divided each of these regions into districts of virtually identical population. Thirty-one of the 41 districts were thus constructed, with the remaining 10 composed of groupings of whole counties. The most populous district had more than 26,000 (6.488%) above the mean population while the smallest district had over 27,000 (6.608%) below the mean. The District Court sustained the statute, stating that the plan afforded the voters "an opportunity to vote in the 1968 and 1970 elections on the basis of population equality within reasonably comparable districts." *Held:*

1. The holding of *Kirkpatrick* v. *Preisler, ante,* p. 526, that "the command of Art. I, § 2, that States create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown," requires equalized population in all districts and is not satisfied by equalizing population only within defined sub-states. P. 546.

(a) There is no claim that New York made a good-faith effort to achieve precise mathematical equality among its 41 districts. P. 546.

(b) "[T]o accept population variances, large or small, in order to create districts with specific interest orientations is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people." *Kirkpatrick* v. *Preisler, supra,* at 533. P. 546.

(c) Variances cannot be justified by the fact that some districts are constructed of entire counties. P. 546.

2. In view of the ample time remaining to promulgate a constitutional plan prior to the 1970 election, as distinguished from the 1968 election, the District Court's judgment is reversed insofar as it approved the plan for the 1970 election. P. 547.

281 F. Supp. 821, reversed in part and remanded.

Robert B. McKay argued the cause and filed a brief for appellant.

George D. Zuckerman, Assistant Attorney General of New York, argued the cause for appellees. With him on the brief were *Louis J. Lefkowitz,* Attorney General, *pro se,* and *Samuel A. Hirshowitz,* First Assistant Attorney General.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case was argued with *Kirkpatrick* v. *Preisler, ante,* p. 526, which affirmed the judgment of a three-judge District Court declaring invalid Missouri's 1967 congressional districting statute. Before us here is a judgment of a three-judge District Court for the Southern District of New York which sustained the validity of New York's 1968 congressional districting statute, N. Y. Laws 1968, c. 8. 281 F. Supp. 821 (1968). In 1967 that court had struck down an earlier districting statute apportioning New York's 41 congressional seats and had retained jurisdiction of the case pending action by the New York Legislature to redress the plan's deficiencies. The court recognized that a thorough revision of district lines might not be possible in time for the upcoming 1968 congressional election but concluded nevertheless that "[t]here are enough changes which can be superimposed on the present districts to cure the most flagrant inequalities." 273 F. Supp. 984, 992, aff'd, 389 U. S. 421 (1967).

On February 28, 1968, a month and a half after the New York Legislature reconvened, the districting statute presently under attack was enacted. After a hearing, the three-judge court, on March 20, 1968, sustained the statute, stating that the districting plan afforded New York voters "an opportunity to vote in the 1968 and 1970 elections on a basis of population equality within reasonably comparable districts." 281 F. Supp., at 826.

We noted probable jurisdiction. 393 U. S. 819 (1968). We reverse insofar as the judgment of the District Court sustains the plan for use in the 1970 congressional election.

Appellant levels two constitutional attacks against the statute: (1) that the statute violates the equal-population principle of *Wesberry* v. *Sanders,* 376 U. S. 1 (1964), and (2) that the statute represents a systematic and intentional partisan gerrymander violating Art. I, § 2, of the Constitution and the Fourteenth Amendment. We do not reach, and intimate no view upon the merits of, the attack upon the statute as a constitutionally impermissible gerrymander. We hold that reversal of the District Court's judgment is compelled by our decision today in *Kirkpatrick* v. *Preisler, supra,* which elucidates the command of *Wesberry* that congressional districting meet the standard of equal representation for equal numbers of people as nearly as is practicable.

The District Court correctly held in its 1967 opinion that "there is a burden on the proponent of any districting plan to justify deviations from equality." 273 F. Supp., at 987. The District Court took no testimony on the question of justification at the hearing held to consider the 1968 statute. Recognizing that the statute, which was enacted with virtually no debate on its merits in either house of the New York Legislature, was the work of a Joint Legislative Committee, the court's 1968 opinion refers to the Report of the Joint Committee as the source of the justifications relied upon as sufficient to sustain the population disparities created by the plan. 281 F. Supp., at 823–824. We have been referred to the same source.

The Report recites that the Committee "gave priority to the population totals in the several districts" as they appeared in the 1960 decennial census and that "very limited" consideration was given to population shifts within the State since 1960. The Report recites further that "[o]ther considerations were the geographical conformation of the area to be districted, the maintenance of county integrity, the facility by which the various Boards of Elections can 'tool up' for the forthcoming [1968] primary election, equality of population within the region, and equality of population throughout the state." Interim Report of the Joint Legislative Committee on Reapportionment of N. Y. State Legislature (1968).

The heart of the scheme, however, lay in the decision to treat seven sections of the State as homogeneous regions and to divide each region into congressional districts of virtually identical population. Thirty-one of New York's 41 congressional districts were constructed on that principle. The remaining 10 districts were composed of groupings of whole counties. A chart showing the population of each district under the 1968 statute appears in the Appendix to this opinion. The seven regions are: (a) Suffolk and Nassau Counties on Long Island with five districts having an average population of 393,391 and a maximum deviation from that average of 208; (b) Queens County with four districts having an average population of 434,672 and a maximum deviation from that average of 120; (c) Kings County plus a district made up of part of Kings and part of Queens, and a district made up of Richmond County and part of Kings, with seven districts having an average population of 417,171 and a maximum deviation from that average of 307; (d) New York and Bronx Counties with eight districts having an average population of 390,415 and a maximum deviation from that average of 496; (e) Westchester and Putnam Counties with two districts having an average population of 420,307 and a maximum deviation from that average of 161; (f) Wayne plus part of Monroe and the remainder of Monroe plus four other counties with two districts having an average population of 410,688 and a maximum deviation from that average of 256; and (g) Erie and Niagara Counties with three districts having an average population of 435,652 and a maximum deviation from that average of 228. The 10 remaining "North country" districts were composed of groupings of whole counties.

It is clear that our decision in *Kirkpatrick* v. *Preisler, supra,* compels the conclusion that this scheme is unconstitutional. We there held, at 531, that "the command of Art. I, § 2, that States create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." The general command, of course, is to equalize population in all the districts of the State and is not satisfied by equalizing population only within defined sub-states. New York could not and does not claim that the legislature made a good-faith effort to achieve precise mathematical equality among its 41 congressional districts. Rather, New York tries to justify its scheme of constructing equal districts only within each of seven sub-states as a means to keep regions with distinct interests intact. But we made clear in *Kirkpatrick* that "to accept population variances, large or small, in order to create districts with specific interest orientations is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people." To accept a scheme such as New York's would permit groups of districts with defined interest orientations to be overrepresented at the expense of districts with different interest orientations. Equality of population among districts in a sub-state is not a justification for inequality among all the districts in the State.

Nor are the variations in the "North country" districts justified by the fact that these districts are constructed of entire counties. *Kirkpatrick* v. *Preisler, supra.*

We appreciate that the decision of the District Court did not rest entirely on an appraisal of the merits of the New York plan. As noted earlier, when the three-judge District Court in 1967 held the then-existing districting plan unconstitutional, it recognized that the imminence of the 1968 election made redistricting an unrealistic possibility and therefore said only that "[t]here are enough changes which can be superimposed on the present districts to cure the most flagrant inequalities." 273 F. Supp., at 992. On February 26, 1968, the New York Legislature enacted the plan before us. On March 20, 1968, the District Court approved the plan for both the 1968 and 1970 congressional elections. Since the 1968 primary election was only three months away on March 20, we cannot say that there was error in permitting the 1968 election to proceed under the plan despite its constitutional infirmities. See *Kilgarlin* v. *Hill,* 386 U. S. 120, 121 (1967); *Martin* v. *Bush,* 376 U. S. 222, 223 (1964); *Kirkpatrick* v. *Preisler,* 390 U. S. 939 (1968). But ample time remains to promulgate a plan meeting constitutional standards before the election machinery must be set in motion for the 1970 election. We therefore reverse the judgment of the District Court insofar as it approved the plan for use in the 1970 election and remand the case for the entry of a new judgment consistent with this opinion.

It is so ordered.

APPENDIX TO OPINION OF THE COURT.

POPULATION OF NEW YORK'S CONGRESSIONAL DISTRICTS UNDER 1968 PLAN.

C.D.		*Dev. %*	*Description.*
1	393,585	− 3.845	Part of Suffolk.
2	393,465	− 3.874	Part of Suffolk, Part of Nassau.
3	393,434	− 3.882	Part of Nassau.
4	393,183	− 3.943	Part of Nassau.
5	393,288	− 3.918	Part of Nassau.

C.D.		*Dev. %*	*Description.*
6	434,615	+ 6.178	Part of Queens.
7	434,750	+ 6.212	Part of Queens.
8	434,552	+ 6.163	Part of Queens.
9	434,770	+ 6.217	Part of Queens.
10	417,122	+ 1.905	Part of Queens, Part of Kings.
11	417,090	+ 1.897	Part of Kings.
12	417,298	+ 1.948	Part of Kings.
13	417,040	+ 1.885	Part of Kings.
14	417,080	+ 1.895	Part of Kings.
15	417,090	+ 1.898	Part of Kings.
16	417,478	+ 1.992	Richmond, Part of Kings.
17	390,742	− 4.540	Part of New York.
18	390,861	− 4.511	Part of New York.
19	390,023	− 4.715	Part of New York.
20	390,363	− 4.632	Part of New York.
21	390,552	− 4.586	Part of New York, Part of Bronx.
22	390,492	− 4.601	Part of Bronx.
23	390,228	− 4.665	Part of Bronx.
24	390,057	− 4.707	Part of Bronx.
25	420,146	+ 2.644	Putnam, Part of Westchester.
26	420,467	+ 2.722	Part of Westchester.
27	409,349		Rockland, Orange, Sullivan, Delaware.
28	396,122	− 3.225	Dutchess, Ulster, Columbia, Greene, Schoharie.
29	425,822	+ 4.031	Albany, Schenectady.
30	415,030	+ 1.394	Rensselaer, Saratoga, Washington, Warren, Fulton, Hamilton, Essex.
31	425,905	+ 4.051	Clinton, St. Lawrence, Jefferson, Lewis, Franklin, Oswego.
32	385,406	− 5.843	Oneida, Madison, Herkimer.
33	415,333	+ 1.468	Chemung, Broome, Tioga, Tompkins.
34	423,028	+ 3.348	Onondaga.
35	386,148	− 5.662	Ontario, Yates, Seneca, Cayuga, Cortland, Chenango, Otsego, M'gomery.
36	410,943	+ 0.396	Part of Monroe, Wayne.
37	410,432	+ 0.271	Part of Monroe, Orleans, Genesee, Wyoming, Livingston.
38	382,277	− 6.608	Chautauqua, Cattaraugus, Allegany, Steuben, Schuyler.
39	435,393	+ 6.369	Part of Erie.
40	435,684	+ 6.440	Part of Erie, Niagara.
41	435,880	+ 6.488	Part of Erie.

State Mean	409,324
Largest District (41st C. D.)	435,880
Smallest District (38th C. D.)	382,277
Citizen Population Variance (largest district population divided by the smallest district population)	1.139 to 1
Maximum Deviation above State Mean	6.488%
Maximum Deviation below State Mean	6.608%

MR. JUSTICE FORTAS, concurring.

I concur in the judgment of the Court and in its opinion except to the extent that the opinion relies upon the Court's opinion in the Missouri redistricting cases, *Kirkpatrick* v. *Preisler, ante,* p. 526, which I have not joined for the reasons stated in my concurring opinion in those cases.

New York does not attempt to defend its plan as a good-faith effort to achieve districts of approximate equality. It argues that it devised a plan based upon the grouping of districts into regions. I agree with the majority that, for purposes of the congressional districting here involved, the State may not substantially or grossly disregard population or residence figures in order to recognize regional groupings within the State. See my dissent in *Avery* v. *Midland County,* 390 U. S. 474, 495 (1968).

MR. JUSTICE HARLAN, with whom MR. JUSTICE STEWART joins, dissenting.*

Whatever room remained under this Court's prior decisions for the free play of the political process in matters of reapportionment is now all but eliminated by today's Draconian judgments. Marching to the nonexistent "command of Art. I, § 2" of the Constitution,[1] the Court now transforms a political slogan

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*[This opinion applies also to No. 30, *Kirkpatrick* v. *Preisler, ante,* p. 526.]

[1] See *ante,* at 546; *Kirkpatrick* v. *Preisler, ante,* at 531. I have discussed in my dissenting opinion in *Wesberry* v. *Sanders,* 376

into a constitutional absolute. Strait indeed is the path of the righteous legislator. Slide rule in hand, he must avoid all thought of county lines, local traditions, politics, history, and economics, so as to achieve the magic formula: one man, one vote.

As my Brothers WHITE and FORTAS demonstrate, insistence on mathematical perfection does not make sense even on its own terms. Census figures themselves are inexact; our mobile population rapidly renders them obsolete; large groups of ineligible voters are unevenly distributed throughout the State. Nevertheless, the Court refuses to permit any room for legislative common sense to compensate for Census Bureau inadequacies. If no "scientific" data are available to justify a divergence from census figures, the Court holds that nothing can be done—"we mean to open no avenue for subterfuge." *Kirkpatrick* v. *Preisler, ante,* at 535.

This all-pervasive distrust of the legislative process is completely alien to established notions of judicial review. See *Butler* v. *Pennsylvania,* 10 How. 402 (1851); *Davis* v. *Department of Labor,* 317 U. S. 249 (1942); *Flemming* v. *Nestor,* 363 U. S. 603 (1960). Nor does it have precedent in the prior reapportionment decisions themselves. "*Reynolds* v. *Sims* . . . recognized that mathematical exactness is not required in state apportionment plans. *De minimis* deviations are unavoidable . . . ." *Swann* v. *Adams,* 385 U. S. 440, 444 (1967); see also *Wesberry* v. *Sanders,* 376 U. S. 1, 18 (1964).[2]

U. S. 1, 20 (1964), the extraordinary historical leap involved in reading the straightforward constitutional provision that "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . ." as a command for equal districts.

[2] While *Wesberry* cautions that "it may not be possible to draw congressional districts with mathematical precision," 376 U. S., at 18, it did not attempt to delineate the extent to which the States may properly deviate from the "ideal."

Even more important, the Court's exclusive concentration upon arithmetic blinds it to the realities of the political process, as the *Rockefeller* case makes so clear. The fact of the matter is that the rule of absolute equality is perfectly compatible with "gerrymandering" of the worst sort. A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues. The legislature must do more than satisfy one man, one vote; it must create a structure which will in fact as well as theory be responsive to the sentiments of the community. On the record before us, however, there is absolutely no indication that the New York Legislature can satisfy this Court's demand for absolute equality and yet create a structure which will permit New York's multitude of political groups to have a fair chance at having their voices heard in Congress.

Even the appellant himself does not suggest that it is possible to create a proper apportionment plan which is at the same time consistent with the demands of perfect mathematical equality. The plan he advances contemplates a maximum deviation of 4.7% from the state average, which represents an improvement of only 1.9 percentage points on the State's 6.6% deviation. Moreover, under the State's plan, a majority of the congressional delegation can represent no less than 49.3% of the population. The appellant's scheme "improves" this figure by 0.5%, increasing the number to 49.8%. See Appellant's Appendix D. Perfection, however, is still 0.2% away.

Although the appellant's plan offers such marginal benefits of voting egalitarianism, and although the record contains no suggestion of any other plan which even arguably permits the coherent expression of the popular will, the Court rejects the legislature's considered proposal simply because it seeks to remain true to traditional county and regional lines. In doing so, the majority ignores the salutary warning to be found in *Reynolds* v. *Sims,* 377 U. S. 533, 578–579 (1964): "Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." Yet, today the Court condemns the legislature's approach because it "permit[s] groups of districts with defined interest orientations to be overrepresented at the expense of districts with different interest orientations." *Ante,* at 546. Of course, all districting decisions inevitably involve choices between different interest groups. But as *Reynolds* recognized, legislatures prefer to follow traditional county and regional lines so that the demands of blatant partisanship will be tempered by the constraints of history and tradition. If the Court believes it has struck a blow today for fully responsive representative democracy, it is sorely mistaken. Even more than in the past, district lines are likely to be drawn to maximize the political advantage of the party temporarily dominant in public affairs.

We do not deal here with the hopelessly malapportioned legislature unwilling to set its own house in order. Rather, the question before us is whether the Constitution requires that mathematics be a substitute for common sense in the art of statecraft. As I do not think that the apportionment plans submitted by the States of New York and Missouri can properly be regarded as offensive to the requirement of equality imposed in *Wesberry*—a case whose constitutional reasoning I still find it impossible to swallow, but by whose dictate I consider myself bound—I dissent.

I would reverse the judgments of the District Court in the Missouri cases and affirm the decision of the District Court in the New York case.

MR. JUSTICE WHITE, dissenting.*

I have consistently joined the Court's opinions which establish as one of the ground rules for legislative districting that single member districts should be substantially equal in population. I would not now dissent if the Court's present judgments represented a measurable contribution to the ends which I had thought the Court was pursuing in this area, or even if I thought the opinions not very useful but not harmful either. With all due respect, however, I am firmly convinced that the Court's new rulings are unduly rigid and unwarranted applications of the Equal Protection Clause which will unnecessarily involve the courts in the abrasive task of drawing district lines.

Accepting for constitutional purposes that a State may assign the task of apportioning its legislature or congressional delegation to the legislature itself, I would not quibble with the legislative judgment if variations between districts were acceptably small. And I would be willing to establish a population variation figure which if not exceeded would normally not call for judicial intervention. As a rule of thumb, a variation between the largest and the smallest district of no more than 10% to 15% would satisfy me, absent quite unusual circumstances not present in any of these cases. At the very least, at this trivial level, I would be willing to view state explanations of the variance with a more tolerant eye.

This would be far more reasonable than the Court's demand for an absolute but illusory equality or for an apportionment plan which approaches this goal so nearly that no other plan can be suggested which would come

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*[This opinion applies also to No. 30, *Kirkpatrick* v. *Preisler*, *ante*, p. 526.]

nearer. As MR. JUSTICE FORTAS demonstrates, the 1960 census figures were far from accurate when they were compiled by professional enumerators and statisticians bent on precision, in 1960. Massive growth and shifts in population since 1960 made the 1960 figures even more inaccurate by 1967. That is why a new census is taken every 10 years. When the Court finds a 3% variation from substantially inexact figures constitutionally impermissible it is losing perspective and sticking at a trifle.

It also seems arbitrary for the majority to discard the suggestion of *Reynolds* v. *Sims,* 377 U. S. 533 (1964), that if a legislature seeks an apportionment plan which respects the boundaries of political subdivisions, some variations from absolute equality would be constitutionally permissible. Of course, *Reynolds* involved state legislative apportionment and took pains to say that there may be more leeway in that context. But the Court invokes *Reynolds* today and in no way distinguishes federal from state districting.

Reynolds noted that "[i]ndiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." 377 U. S., at 578–579. The Court nevertheless now rules that regard for these boundaries is no justification for districts which vary no more than 3% from the norm where another plan which may have no regard for district lines reduces the variation to an even smaller figure. I have similar objections to the Court's rejection of geographical compactness as an acceptable justification for minor variations among congressional districts. This rejection of the virtues of compactness will not be lost on those who would use congressional and legislative districting to bury their political opposition.

In reality, of course, districting is itself a gerrymandering in the sense that it represents a complex blend of political, economic, regional, and historical considerations. In terms of the gerrymander, the situation will not be much different if equality means what it literally says—a zero variation—rather than only "substantial" equality which would countenance some variations among legislative districts. Either standard will prevent a minority of the population or a minority party from consistently controlling the state legislature or a congressional delegation, and both are powerful forces toward equalizing voter influence on legislative performance. In terms of effective representation for all voters there are only minuscule differences between the two standards. But neither rule can alone prevent deliberate partisan gerrymandering if that is considered an evil which the Fourteenth Amendment should attempt to proscribe.

Today's decisions on the one hand require precise adherence to admittedly inexact census figures, and on the other downgrade a restraint on a far greater potential threat to equality of representation, the gerrymander. Legislatures intent on minimizing the representation of selected political or racial groups are invited to ignore political boundaries and compact districts so long as they adhere to population equality among districts using standards which we know and they know are sometimes quite incorrect. I see little merit in such a confusion of priorities.

Moreover, today's decisions will lead to an unnecessary intrusion of the judiciary into legislative business. It would be one thing if absolute equality were possible. But, admittedly, it is not. The Court may be groping for a clean-cut, *per se* rule which will minimize confrontations between courts and legislatures while also satisfying the Fourteenth Amendment. If so, the Court is wide of the mark. Today's results simply shift the area of dispute a few percentage points down the scale; the courts will now be engaged in quibbling disputes over such questions as whether a plan with a 1% variation is "better" than one with a larger variation, say 1.1% or even 2%. If county and municipal boundaries are to be ignored, a computer can produce countless plans for absolute population equality, one differing very little from another, but each having its own very different political ramifications. Ultimately, the courts may be asked to decide whether some families in an apartment house should vote in one district and some in another, if that would come closer to the standard of apparent equality. Using the spacious language of the Equal Protection Clause to inject the courts into these minor squabbles is an unacceptable pre-emption of the legislative function. Not only will the Court's new rule necessarily precipitate a new round of congressional and legislative districting, but also I fear that in the long run the courts, rather than the legislatures or nonpartisan commissions, will be making most of the districting decisions in the several States. Since even at best, with compact and equal districts, the final boundary lines unavoidably have significant political repercussions, the courts should not draw district lines themselves unnecessarily. I therefore dissent.

STANLEY v. GEORGIA.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

No. 293. Argued January 14–15, 1969.—Decided April 7, 1969.

Under authority of a warrant to search appellant's home for evidence of his alleged bookmaking activities, officers found some films in his bedroom. The films were projected and deemed to be obscene. Appellant was arrested for their possession. He was thereafter indicted, tried, and convicted for "knowingly hav[ing] possession of . . . obscene matter" in violation of a Georgia law. The Georgia Supreme Court affirmed, holding it "not essential to an indictment charging one with possession of obscene matter that it be alleged that such possession was 'with intent to sell, expose or circulate the same.'" Appellant contends that the Georgia obscenity statute is unconstitutional insofar as it punishes mere private possession of obscene matter. Georgia, relying on *Roth* v. *United States*, 354 U. S. 476, argues the statute's validity on the ground that "obscenity is not within the area of constitutionally protected speech or press." *Id.*, at 485. *Held:* The First Amendment as made applicable to the States by the Fourteenth prohibits making mere private possession of obscene material a crime. Pp. 560–568.

(a) Neither *Roth, supra,* nor subsequent decisions of the Court were made in the context of a statute punishing mere private possession of obscene material, but involved governmental power to prohibit or regulate certain public actions respecting obscene matter. Pp. 560–564.

(b) The Constitution protects the right to receive information and ideas, regardless of their social worth, and to be generally free from governmental intrusions into one's privacy and control of one's thoughts. Pp. 564–566.

(c) The State may not prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct, *Roth, supra,* distinguished, or proscribe such possession on the ground that it is a necessary incident to a statutory scheme prohibiting distribution, see *Smith* v. *California*, 361 U. S. 147. Pp. 566–568.

224 Ga. 259, 161 S. E. 2d 309, reversed and remanded.

Wesley R. Asinof argued the cause and filed a brief for appellant.

J. Robert Sparks argued the cause for appellee. With him on the brief was *Lewis R. Slaton.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

An investigation of appellant's alleged bookmaking activities led to the issuance of a search warrant for appellant's home. Under authority of this warrant, federal and state agents secured entrance. They found very little evidence of bookmaking activity, but while looking through a desk drawer in an upstairs bedroom, one of the federal agents, accompanied by a state officer, found three reels of eight-millimeter film. Using a projector and screen found in an upstairs living room, they viewed the films. The state officer concluded that they were obscene and seized them. Since a further examination of the bedroom indicated that appellant occupied it, he was charged with possession of obscene matter and placed under arrest. He was later indicted for "knowingly hav[ing] possession of . . . obscene matter" in violation of Georgia law.[1] Appellant was tried before a jury and convicted. The Supreme Court of Georgia affirmed. *Stanley* v. *State,* 224 Ga. 259, 161 S. E. 2d 309 (1968). We noted probable jurisdiction of an appeal brought under 28 U. S. C. § 1257 (2). 393 U. S. 819 (1968).

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[1] "Any person who shall knowingly bring or cause to be brought into this State for sale or exhibition, or who shall knowingly sell or offer to sell, or who shall knowingly lend or give away or offer to lend or give away, or who shall knowingly have possession of, or who shall knowingly exhibit or transmit to another, any obscene matter, or who shall knowingly advertise for sale by any form of notice, printed, written, or verbal, any obscene matter, or who shall knowingly manufacture, draw, duplicate or print any obscene matter with intent to sell, expose or circulate the same, shall, if such person has knowledge or reasonably should know of the obscene nature of such matter, be guilty of a felony, and, upon conviction thereof, shall be punished by confinement in the penitentiary for not less than one year nor more than five years: Provided, however, in the event the

Appellant raises several challenges to the validity of his conviction.[2] We find it necessary to consider only one. Appellant argues here, and argued below, that the Georgia obscenity statute, insofar as it punishes mere private possession of obscene matter, violates the First Amendment, as made applicable to the States by the Fourteenth Amendment. For reasons set forth below, we agree that the mere private possession of obscene matter cannot constitutionally be made a crime.

The court below saw no valid constitutional objection to the Georgia statute, even though it extends further than the typical statute forbidding commercial sales of obscene material. It held that "[i]t is not essential to an indictment charging one with possession of obscene matter that it be alleged that such possession was 'with intent to sell, expose or circulate the same.'" *Stanley* v. *State, supra,* at 261, 161 S. E. 2d, at 311. The State and appellant both agree that the question here before us is whether "a statute imposing criminal sanctions upon the mere [knowing] possession of obscene matter" is constitutional. In this context, Georgia concedes that the present case appears to be one of "first

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jury so recommends, such person may be punished as for a misdemeanor. As used herein, a matter is obscene if, considered as a whole, applying contemporary community standards, its predominant appeal is to prurient interest, i. e., a shameful or morbid interest in nudity, sex or excretion." Ga. Code Ann. § 26-6301 (Supp. 1968).

[2] Appellant does not argue that the films are not obscene. For the purpose of this opinion, we assume that they are obscene under any of the tests advanced by members of this Court. See *Redrup* v. *New York,* 386 U. S. 767 (1967).

impression . . . on this exact point,"[3] but contends that since "obscenity is not within the area of constitutionally protected speech or press," *Roth* v. *United States*, 354 U. S. 476, 485 (1957), the States are free, subject to the limits of other provisions of the Constitution, see, *e. g., Ginsberg* v. *New York*, 390 U. S. 629, 637–645 (1968), to deal with it any way deemed necessary, just as they may deal with possession of other things thought to be detrimental to the welfare of their citizens. If the State can protect the body of a citizen, may it not, argues Georgia, protect his mind?

It is true that *Roth* does declare, seemingly without qualification, that obscenity is not protected by the First Amendment. That statement has been repeated in various forms in subsequent cases. See, *e. g., Smith* v. *California*, 361 U. S. 147, 152 (1959); *Jacobellis* v. *Ohio*, 378 U. S. 184, 186–187 (1964) (opinion of BRENNAN, J.); *Ginsberg* v. *New York, supra*, at 635. However, neither *Roth* nor any subsequent decision of this Court dealt with the precise problem involved in the present case. Roth was convicted of mailing obscene circulars and advertising, and an obscene book, in violation of a federal obscenity statute.[4] The defendant in a companion case, *Alberts* v. *California*, 354 U. S. 476 (1957), was convicted of "lewdly keeping for sale obscene and indecent books, and [of] writing, composing and publishing an obscene advertisement of them . . . ." *Id.*, at 481. None of the statements cited by the Court in

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[3] The issue was before the Court in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), but that case was decided on other grounds. MR. JUSTICE STEWART, although disagreeing with the majority opinion in *Mapp*, would have reversed the judgment in that case on the ground that the Ohio statute proscribing mere possession of obscene material was "not 'consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment.'" *Id.*, at 672.

[4] 18 U. S. C. § 1461.

Roth for the proposition that "this Court has always assumed that obscenity is not protected by the freedoms of speech and press" were made in the context of a statute punishing mere private possession of obscene material; the cases cited deal for the most part with use of the mails to distribute objectionable material or with some form of public distribution or dissemination.[5] Moreover, none of this Court's decisions subsequent to *Roth* involved prosecution for private possession of obscene materials. Those cases dealt with the power of the State and Federal Governments to prohibit or regulate certain public actions taken or intended to be taken with respect to obscene matter.[6] Indeed, with one exception, we have been unable to discover any case in which the issue in the present case has been fully considered.[7]

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[5] *Ex parte Jackson,* 96 U. S. 727, 736–737 (1878) (use of the mails); *United States* v. *Chase,* 135 U. S. 255, 261 (1890) (use of the mails); *Robertson* v. *Baldwin,* 165 U. S. 275, 281 (1897) (publication); *Public Clearing House* v. *Coyne,* 194 U. S. 497, 508 (1904) (use of the mails); *Hoke* v. *United States,* 227 U. S. 308, 322 (1913) (use of interstate facilities); *Near* v. *Minnesota,* 283 U. S. 697, 716 (1931) (publication); *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571–572 (1942) (utterances); *Hannegan* v. *Esquire, Inc.,* 327 U. S. 146, 158 (1946) (use of the mails); *Winters* v. *New York,* 333 U. S. 507, 510 (1948) (possession with intent to sell); *Beauharnais* v. *Illinois,* 343 U. S. 250, 266 (1952) (libel).

[6] Many of the cases involved prosecutions for sale or distribution of obscene materials or possession with intent to sell or distribute. See *Redrup* v. *New York,* 386 U. S. 767 (1967); *Mishkin* v. *New York,* 383 U. S. 502 (1966); *Ginzburg* v. *United States,* 383 U. S. 463 (1966); *Jacobellis* v. *Ohio,* 378 U. S. 184 (1964); *Smith* v. *California,* 361 U. S. 147 (1959). Our most recent decision involved a prosecution for sale of obscene material to children. *Ginsberg* v. *New York,* 390 U. S. 629 (1968); cf. *Interstate Circuit, Inc.* v. *City of Dallas,* 390 U. S. 676 (1968). Other cases involved federal or state statutory procedures for preventing the distribution or mailing of obscene material, or procedures for predistribution approval. See *Freedman* v. *Maryland,* 380 U. S. 51 (1965); *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963); *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478 (1962). Still another case dealt with an attempt to seize obscene material "kept for the purpose

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of being sold, published, exhibited . . . or otherwise distributed or circulated . . . ." *Marcus* v. *Search Warrant*, 367 U. S. 717, 719 (1961); see also *A Quantity of Books* v. *Kansas*, 378 U. S. 205 (1964). *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966), was a proceeding in equity against a book. However, possession of a book determined to be obscene in such a proceeding was made criminal only when "for the purpose of sale, loan or distribution." *Id.*, at 422.

[7] The Supreme Court of Ohio considered the issue in *State* v. *Mapp*, 170 Ohio St. 427, 166 N. E. 2d 387 (1960). Four of the seven judges of that court felt that criminal prosecution for mere private possession of obscene materials was prohibited by the Constitution. However, Ohio law required the concurrence of "all but one of the judges" to declare a state law unconstitutional. The view of the "dissenting" judges was expressed by Judge Herbert:

"I cannot agree that mere private possession of . . . [obscene] literature by an adult should constitute a crime. The right of the individual to read, to believe or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his own private library seems to the writer to be a clear infringement of his constitutional rights as an individual." 170 Ohio St., at 437, 166 N. E. 2d, at 393.

Shortly thereafter, the Supreme Court of Ohio interpreted the Ohio statute to require proof of "possession and control for the purpose of circulation or exhibition." *State* v. *Jacobellis*, 173 Ohio St. 22, 27–28, 179 N. E. 2d 777, 781 (1962), rev'd on other grounds, 378 U. S. 184 (1964). The interpretation was designed to avoid the constitutional problem posed by the "dissenters" in *Mapp*. See *State* v. *Ross*, 12 Ohio St. 2d 37, 231 N. E. 2d 299 (1967).

Other cases dealing with nonpublic distribution of obscene material or with legitimate uses of obscene material have expressed similar reluctance to make such activity criminal, albeit largely on statutory grounds. In *United States* v. *Chase*, 135 U. S. 255 (1890), the Court held that federal law did not make criminal the mailing of a private sealed obscene letter on the ground that the law's purpose was to purge the mails of obscene matter "as far as was consistent with the rights reserved to the people, and with a due regard to the security of private correspondence . . . ." 135 U. S., at 261. The

In this context, we do not believe that this case can be decided simply by citing *Roth*. *Roth* and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity. But the assertion of that interest cannot, in every context, be insulated from all constitutional protections. Neither *Roth* nor any other decision of this Court reaches that far. As the Court said in *Roth* itself, "[c]easeless vigilance is the watchword to prevent . . . erosion [of First Amendment rights] by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests." 354 U. S., at 488. *Roth* and the cases following it discerned such an "important interest" in the regulation of commercial distribution of

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law was later amended to include letters and was sustained in that form. *Andrews* v. *United States,* 162 U. S. 420 (1896). In *United States* v. *31 Photographs,* 156 F. Supp. 350 (D. C. S. D. N. Y. 1957), the court denied an attempt by the Government to confiscate certain materials sought to be imported into the United States by the Institute for Sex Research, Inc., at Indiana University. The court found, applying the *Roth* formulation, that the materials would not appeal to the "prurient interest" of those seeking to import and utilize the materials. Thus, the statute permitting seizure of "obscene" materials was not applicable. The court found it unnecessary to reach the constitutional questions presented by the claimant, but did note its belief that "the statement . . . [in *Roth*] concerning the rejection of obscenity must be interpreted in the light of the widespread distribution of the material in Roth." 156 F. Supp., at 360, n. 40. See also *Redmond* v. *United States,* 384 U. S. 264 (1966), where this Court granted the Solicitor General's motion to vacate and remand with instructions to dismiss an information charging a violation of a federal obscenity statute in a case where a husband and wife mailed undeveloped films of each other posing in the nude to an out-of-state firm for developing. But see *Ackerman* v. *United States,* 293 F. 2d 449 (C. A. 9th Cir. 1961).

obscene material. That holding cannot foreclose an examination of the constitutional implications of a statute forbidding mere private possession of such material.

It is now well established that the Constitution protects the right to receive information and ideas. "This freedom [of speech and press] . . . necessarily protects the right to receive . . . ." *Martin* v. *City of Struthers,* 319 U. S. 141, 143 (1943); see *Griswold* v. *Connecticut,* 381 U. S. 479, 482 (1965); *Lamont* v. *Postmaster General,* 381 U. S. 301, 307–308 (1965) (BRENNAN, J., concurring); cf. *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925). This right to receive information and ideas, regardless of their social worth, see *Winters* v. *New York,* 333 U. S. 507, 510 (1948), is fundamental to our free society. Moreover, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home—that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." *Olmstead* v. *United States,* 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).

See *Griswold* v. *Connecticut, supra;* cf. *NAACP* v. *Alabama,* 357 U. S. 449, 462 (1958).

These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. Georgia contends that appellant does not have these rights, that there are certain types of materials that the individual may not read or even possess. Georgia justifies this assertion by arguing that the films in the present case are obscene. But we think that mere categorization of these films as "obscene" is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

And yet, in the face of these traditional notions of individual liberty, Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts.[8] To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment. As the Court said in *Kingsley International Pictures Corp.* v. *Regents,* 360 U. S. 684, 688–689 (1959), "[t]his argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. . . . And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing." Cf. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495 (1952). Nor is it relevant that obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all. See *Winters* v. *New York, supra,* at 510. Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.

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[8] "Communities believe, and act on the belief, that obscenity is immoral, is wrong for the individual, and has no place in a decent society. They believe, too, that adults as well as children are corruptible in morals and character, and that obscenity is a source of corruption that should be eliminated. Obscenity is not suppressed primarily for the protection of others. Much of it is suppressed for the purity of the community and for the salvation and welfare of the 'consumer.' Obscenity, at bottom, is not crime. Obscenity is sin." Henkin, Morals and the Constitution: The Sin of Obscenity. 63 Col. L. Rev. 391, 395 (1963).

Perhaps recognizing this, Georgia asserts that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence. There appears to be little empirical basis for that assertion.[9] But more important, if the State is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that "[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law . . . ." *Whitney* v. *California,* 274 U. S. 357, 378 (1927) (Brandeis, J., concurring). See Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 938 (1963). Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.

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[9] See, *e. g.*, Cairns, Paul, & Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 Minn. L. Rev. 1009 (1962); see also M. Jahoda, The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate (1954), summarized in the concurring opinion of Judge Frank in *United States* v. *Roth,* 237 F. 2d 796, 814–816 (C. A. 2d Cir. 1956).

It is true that in *Roth* this Court rejected the necessity of proving that exposure to obscene material would create a clear and present danger of antisocial conduct or would probably induce its recipients to such conduct. 354 U. S., at 486–487. But that case dealt with public distribution of obscene materials and such distribution is subject to different objections. For example, there is always the danger that obscene material might fall into the hands of children, see *Ginsberg* v. *New York, supra,* or that it might intrude upon the sensibilities or privacy of the general public.[10] See *Redrup* v. *New York,* 386 U. S. 767, 769 (1967). No such dangers are present in this case.

Finally, we are faced with the argument that prohibition of possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution. That argument is based on alleged difficulties of proving an intent to distribute or in producing evidence of actual distribution. We are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases. Because that right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws. See *Smith* v. *California,* 361 U. S. 147 (1959).

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[10] The Model Penal Code provisions dealing with obscene materials are limited to cases of commercial dissemination. Model Penal Code § 251.4 (Prop. Official Draft 1962); see also Model Penal Code § 207.10 and comment 4 (Tent. Draft No. 6, 1957); H. Packer, The Limits of the Criminal Sanction 316–328 (1968); Schwartz, Morals Offenses and the Model Penal Code, 63 Col. L. Rev. 669 (1963).

We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime.[11] *Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home. Accordingly, the judgment of the court below is reversed and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, concurring.

I agree with the Court that the mere possession of reading matter or movie films, whether labeled obscene or not, cannot be made a crime by a State without violating the First Amendment, made applicable to the States by the Fourteenth. My reasons for this belief have been set out in many of my prior opinions, as for example, *Smith* v. *California*, 361 U. S. 147, 155 (concurring opinion), and *Ginzburg* v. *United States*, 383 U. S. 463, 476 (dissenting opinion).

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[11] What we have said in no way infringes upon the power of the State or Federal Government to make possession of other items, such as narcotics, firearms, or stolen goods, a crime. Our holding in the present case turns upon the Georgia statute's infringement of fundamental liberties protected by the First and Fourteenth Amendments. No First Amendment rights are involved in most statutes making mere possession criminal.

Nor do we mean to express any opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials. See, *e. g.,* 18 U. S. C. § 793 (d), which makes criminal the otherwise lawful possession of materials which "the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation . . . ." In such cases, compelling reasons may exist for overriding the right of the individual to possess those materials.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE WHITE join, concurring in the result.

Before the commencement of the trial in this case, the appellant filed a motion to suppress the films as evidence upon the ground that they had been seized in violation of the Fourth and Fourteenth Amendments. The motion was denied, and the films were admitted in evidence at the trial. In affirming the appellant's conviction, the Georgia Supreme Court specifically determined that the films had been lawfully seized. The appellant correctly contends that this determination was clearly wrong under established principles of constitutional law. But the Court today disregards this preliminary issue in its hurry to move on to newer constitutional frontiers. I cannot so readily overlook the serious inroads upon Fourth Amendment guarantees countenanced in this case by the Georgia courts.

The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The purpose of these clear and precise words was to guarantee to the people of this Nation that they should forever be secure from the general searches and unrestrained seizures that had been a hated hallmark of colonial rule under the notorious writs of assistance of the British Crown. See *Stanford* v. *Texas*, 379 U. S. 476, 481. This most basic of Fourth Amendment guarantees was frustrated in the present case, I think, in a manner made the more pernicious by its very subtlety. For what happened here was that a search that began as perfectly lawful became the occasion for an unwarranted and unconstitutional seizure of the films.

The state and federal officers gained admission to the appellant's house under the authority of a search warrant issued by a United States Commissioner. The warrant described "the place to be searched" with particularity.[1] With like particularity, it described the "things to be seized"—equipment, records, and other material used in or derived from an illegal wagering business.[2] And the warrant was issued only after the Commissioner had been apprised of more than adequate probable cause to issue it.[3]

There can be no doubt, therefore, that the agents were lawfully present in the appellant's house, lawfully authorized to search for any and all of the items specified in the warrant, and lawfully empowered to seize any such items they might find.[4] It follows, therefore, that the agents were acting within the authority of the warrant when they proceeded to the appellant's upstairs bedroom and pulled open the drawers of his desk. But when they found in one of those drawers not gambling material but moving picture films, the warrant gave them no authority to seize the films.

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[1] "[T]he premises known as 280 Springside Drive, S. E., two story residence with an annex on the main floor constructed of brick and frame, in Atlanta, Fulton County, Georgia, in the Northern District of Georgia . . . ."

[2] "[B]ookmaking records, wagering paraphernalia consisting of bet slips, account sheets, recap sheets, collection sheets, adding machines, money used in or derived from the wagering business, records of purchases, records of real estate and bank transactions, the money for which was derived from the wagering business, and any other property used in the wagering business, which are being used and/or have been used in the operation of a bookmaking business or represent the fruits of a bookmaking business being operated in violation of Sections 4411, 4412 and 7203 IRC of 1954."

[3] Before the Commissioner were no less than four lengthy and detailed affidavits, setting out the grounds for the affiants' reasonable belief that the appellant was engaged in an illegal gambling enterprise, and that the paraphernalia of his trade were concealed in his house.

The controlling constitutional principle was stated in two sentences by this Court more than 40 years ago:

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron* v. *United States,* 275 U. S. 192, 196.

This is not a case where agents in the course of a lawful search came upon contraband, criminal activity, or criminal evidence[5] in plain view. For the record makes clear that the contents of the films could not be determined by mere inspection. And this is not a case that presents any questions as to the permissible scope of a search made incident to a lawful arrest. For the appellant had not been arrested when the agents found the films. After finding them, the agents spent some 50 minutes exhibiting them by means of the appellant's projector in another upstairs room. Only then did the agents return downstairs and arrest the appellant.

Even in the much-criticized case of *United States* v. *Rabinowitz,* 339 U. S. 56, the Court emphasized that "exploratory searches . . . cannot be undertaken by officers with or without a warrant." *Id.*, at 62. This record presents a bald violation of that basic constitutional rule. To condone what happened here is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant.

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[4] The fact that almost no gambling material was actually found has no bearing, of course, upon the validity of the search. The constitutionality of a search depends in no measure upon what it brings to light. *Byars* v. *United States,* 273 U. S. 28, 29.

[5] See *Warden* v. *Hayden,* 387 U. S. 294.

Because the films were seized in violation of the Fourth and Fourteenth Amendments, they were inadmissible in evidence at the appellant's trial. *Mapp* v. *Ohio*, 367 U. S. 643. Accordingly, the judgment of conviction must be reversed.

STEPHAN ET UX. *v.* STATE TAX COMMISSIONER OF DELAWARE.

APPEAL FROM THE SUPREME COURT OF DELAWARE.

No. 844. Decided April 7, 1969.

— Del. —, 245 A. 2d 552, appeal dismissed and certiorari denied.

Edward J. Wilson, Deputy Attorney General of Delaware, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

SOSZKA *v.* MANGANARO ET AL.

APPEAL FROM THE SUPREME COURT OF HAWAII.

No. 857. Decided April 7, 1969.

50 Haw. 484, 443 P. 2d 155, appeal dismissed and certiorari denied.

Morris P. Skinner for appellant.

Stuart M. Cowan for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

ANDERSON *v.* SOUTH CAROLINA.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA.

No. 984, Misc. Decided April 7, 1969.

Appeal dismissed and certiorari denied.

Robert L. Chipley, Jr., for appellant.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied. The request for other relief is denied.

DAVIS *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 1146, Misc. Decided April 7, 1969.

Certiorari granted; 393 F. 2d 100, vacated and remanded.

Solicitor General Griswold, Assistant Attorney General Vinson, and *Beatrice Rosenberg* for the United States.

PER CURIAM.

In accordance with the views expressed by the Solicitor General and upon an examination of the papers in this case, the motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States District Court for the Southern District of California for a further hearing on such evidence as the petitioner may present on the question of his right to appeal.

ROLLERSON *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 1425, Misc. Decided April 7, 1969.

Certiorari granted; — U. S. App. D. C. —, 405 F. 2d 1078, vacated and remanded.

William H. Allen for petitioner.

Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg, and *Roger A. Pauley* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States District Court for the District of Columbia for further consideration in light of *Kaufman* v. *United States, ante,* p. 217.

MR. JUSTICE FORTAS concurs in the disposition of this case but notes that the Court's action does not imply any view as to the merits of any of the petitioner's claims including his assertions as to double jeopardy.

MR. JUSTICE BLACK, MR. JUSTICE HARLAN, and MR. JUSTICE STEWART dissent.

STREET *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 5. Argued October 21, 1968.—Decided April 21, 1969.

Appellant, having heard a news broadcast of the shooting of James Meredith, a civil rights leader, took an American flag which he owned to a street corner near his home in New York and ignited the flag. He was arrested and thereafter charged by information with malicious mischief for violating § 1425, subd. 16, par. d, of the New York Penal Law, which makes it a crime publicly to mutilate or "publicly [to] defy . . . or cast contempt upon [any American flag] either by words or act." The information charged appellant with burning the American flag and publicly speaking defiant or contemptuous words about the flag. Appellant unsuccessfully moved to dismiss the information on the ground that the statute violated his constitutional right to free expression by punishing him for activity which he contended was a constitutionally protected "demonstration" or "protest." Appellant was tried before a judge without a jury and convicted. The arresting officer testified that at the time of arrest appellant was standing on a corner speaking to a small and not unruly group, which did not block the street or sidewalk; on the opposite corner was the burning flag; appellant told the group: "We don't need no damn flag," and said to the officer, "If they let that happen to Meredith, we don't need an American flag." Appellant also challenged the constitutionality of the "words" part of the statute in the Appellate Term and in the New York Court of Appeals, both of which affirmed his conviction, the latter court upholding the constitutionality of the statute without alluding to the "words" part. *Held:*

1. Appellant has met the burden of showing that the federal question of constitutionality of the "words" part of the statute was adequately raised in the state courts, by appellant's motion to dismiss in the trial court and his briefs in the appellate courts. Pp. 581–585.

2. The application of § 1425, subd. 16, par. d, to appellant was violative of rights of free expression assured against state infringement by the Fourteenth Amendment, because it permitted him to be punished merely for speaking defiant or contemptuous words about the American flag. Pp. 581, 585–594.

(a) Appellant's conviction must be set aside if it could have been based solely upon his words, or upon both his words and his act, and if a conviction on such a basis would be unconstitutional. *Stromberg* v. *California,* 283 U. S. 359 (1931); *Thomas* v. *Collins,* 323 U. S. 516 (1945). Pp. 585–588.

(b) The record here is insufficient to eliminate the possibility that appellant's words were the sole basis of his conviction or that he was convicted for both his words and his deed. Pp. 588–590.

(c) Appellant's conviction under § 1425, subd. 16, par. d, for speaking as he did could not be constitutionally justified on the basis that the words he uttered (1) constituted incitement to others to commit unlawful acts; (2) were so inflammatory as to provoke violent retaliation by others; (3) were (apart from the content of the ideas they conveyed) likely to shock passers-by; or (4), in the light of *Board of Educ.* v. *Barnette,* 319 U. S. 624 (1943), constituted failure by the appellant to manifest the respect which every citizen must show the flag. Pp. 590–593.

20 N. Y. 2d 231, 229 N. E. 2d 187, reversed and remanded.

David T. Goldstick argued the cause for appellant. With him on the briefs were *Albert H. Blumenthal, Osmond K. Fraenkel, Alan H. Levine,* and *Melvin L. Wulf.*

Harry Brodbar argued the cause for appellee. With him on the brief was *Elliott Golden.*

Briefs of *amici curiae* urging affirmance were filed by *Louis J. Lefkowitz,* Attorney General, *pro se, Samuel A. Hirshowitz,* First Assistant Attorney General, and *Brenda Soloff,* Assistant Attorney General, for the Attorney General of New York, and by *Peter Megargee Brown* for the United States Flag Foundation, Inc.

MR. JUSTICE HARLAN delivered the opinion of the Court.

Appellant Street has been convicted in the New York courts of violating former § 1425, subd. 16, par. d, of the New York Penal Law, which makes it a misdemeanor "publicly [to] mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act [any flag of the United States]."[1] He was given a suspended sentence. We must decide whether, in light of all the circumstances, that conviction denied to him rights of free expression protected by the First Amendment and assured against state infringement by the Fourteenth Amendment. See *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 269, 271, 276–277 (1964).

According to evidence given at trial, the events which led to the conviction were these. Appellant testified that during the afternoon of June 6, 1966, he was listening to the radio in his Brooklyn apartment. He heard a news report that civil rights leader James Meredith had been shot by a sniper in Mississippi. Saying to himself, "They didn't protect him," appellant, himself a Negro, took from his drawer a neatly folded, 48-star American flag which he formerly had displayed on national holidays. Appellant left his apartment and carried the still-folded flag to the nearby intersection of St. James Place and Lafayette Avenue. Appellant stood on the northeast corner of the intersection, lit the flag with a match, and dropped the flag on the pavement when it began to burn.

Soon thereafter, a police officer halted his patrol car and found the burning flag. The officer testified that he then crossed to the northwest corner of the intersection, where he found appellant "talking out loud" to a small group of persons. The officer estimated that there were some 30 persons on the corner near the flag and five to 10 on the corner with appellant. The officer testified that as he approached within 10 or 15 feet of appellant, he heard appellant say, "We don't need no damn flag," and that when he asked appellant whether he had burned the flag appellant replied: "Yes; that is my flag; I burned it. If they let that happen to Meredith we don't need an American flag." Appellant admitted making the latter response, but he denied that he said anything else and asserted that he always had remained on the corner with the flag.

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[1] N. Y. Penal Law § 1425, subd. 16, par. d (1909). In 1967 § 1425, subd. 16, was superseded by § 136 of the General Business Law, which in par. d defines the offense in identical language. See N. Y. Laws 1965, c. 1031, § 52.

Later the same day, appellant was charged, by an information sworn to before a judge of the New York City Criminal Court, with having committed "the crime of Malicious Mischief in that [he] did wilfully and unlawfully defile, cast contempt upon and burn an American Flag, in violation of 1425–16–D of the Penal Law, under the following circumstances: . . . [he] did wilfully and unlawfully set fire to an American Flag and shout, 'If they did that to Meredith, We don't need an American Flag.'"

Appellant was tried before another Criminal Court judge, sitting without a jury, and was convicted of malicious mischief in violation of § 1425, subd. 16, par. d.[2] He was subsequently given a suspended sentence. The Appellate Term, Second Department, affirmed without opinion. Leave was granted to appeal to the New York Court of Appeals, and after plenary consideration that court unanimously affirmed. 20 N. Y. 2d 231, 229 N. E. 2d 187 (1967). We noted probable jurisdiction. 392 U. S. 923 (1968).[3]

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[2] Appellant was simultaneously tried for disorderly conduct in connection with the same events. He was acquitted of that offense.

[3] At one stage of the proceedings in this Court, the State moved for dismissal on the ground that we lacked jurisdiction over this appeal because the case was moot. The State pointed out that appellant received a suspended sentence, and that the one-year period within which the suspended sentence might have been replaced with a prison sentence under New York law had expired. It further asserted that there were no significant collateral consequences under

Street argues that his conviction was unconstitutional for three different reasons. *First,* he claims that § 1425, subd. 16, par. d, is overbroad, both on its face and as applied, because the section makes it a crime "publicly [to] defy . . . or cast contempt upon [an American flag] *by words* . . . ." (Emphasis added.) *Second,* he contends that § 1425, subd. 16, par. d, is vague and imprecise because it does not clearly define the conduct which it forbids. *Third,* he asserts that New York may not con-

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either New York or federal law. In response, appellant stated that his employer, the New York Transit Authority, had instituted disciplinary proceedings against him as a result of his conviction. Appellant was charged with "misconduct," and according to Transit Authority rules he may be punished by a fine of up to $100 or suspension without pay for up to two months if the still-pending charges are finally sustained. Appellant also noted that §§ 393-c, 482, and 510 of the New York Code of Criminal Procedure provide respectively that his conviction may be used to rebut any character evidence adduced by him in future criminal proceedings; that a record of his conviction must be made available to the judge prior to imposition of any future criminal sentence; and that if convicted of a felony he may now be sentenced as a "habitual criminal."

Only last Term, this Court held in *Ginsberg* v. *New York,* 390 U. S. 629, 633, n. 2 (1968), that the case of a New York appellant was not moot even though the time for revocation of his suspended sentence had expired, because it was possible that his license to operate a luncheonette might be withdrawn in consequence of his conviction. Here there is an actual rather than merely a potential threat that appellant will be deprived of his employment, albeit only temporarily. This Court also held last Term, in *Sibron* v. *New York,* 392 U. S. 40, 50–58 (1968), that the case of a New York appellant who had fully served his misdemeanor sentence was not moot because he apparently could not have brought his case to this Court before completion of his sentence and because the conviction could be used for impeachment and sentencing purposes in future criminal proceedings. Appellant Street similarly was unable, despite diligent prosecution of his appeals, to bring his case here within a year of his sentencing. He is subject to all of the collateral penalties to which Sibron was liable. Hence, both *Ginsberg* and *Sibron* dictate that this case is not moot.

stitutionally punish one who publicly destroys or damages an American flag as a means of protest, because such an act constitutes expression protected by the Fourteenth Amendment. We deem it unnecessary to consider the latter two arguments, for we hold that § 1425, subd. 16, par. d, was unconstitutionally applied in appellant's case because it permitted him to be punished merely for speaking defiant or contemptuous words about the American flag. In taking this course, we resist the pulls to decide the constitutional issues involved in this case on a broader basis than the record before us imperatively requires.

Though our conclusion is a narrow one, it requires pursuit of four lines of inquiry: (1) whether the constitutionality of the "words" part of the statute was passed upon by the New York Court of Appeals; (2) whether, if appellant's conviction may have rested in whole or in part on his utterances and if the statute as thus applied is unconstitutional, these factors in themselves require reversal; (3) whether Street's words may in fact have counted independently in his conviction; and (4) whether the "words" provision of the statute, as presented by this case, is unconstitutional.

I.

The New York Court of Appeals did not mention in its opinion the constitutionality of the "words" part of § 1425, subd. 16, par. d.[4] Hence, in order to vindicate our jurisdiction to deal with this particular issue, we must inquire whether that question was presented to the New York courts in such a manner that it was necessarily decided by the New York Court of Appeals when it affirmed appellant's conviction. If the question was not so presented, then we have no power to consider it. See 28 U. S. C. §§ 1257 (2), 1257 (3); *Bailey* v. *Anderson,* 326 U. S. 203, 206–207 (1945). Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. See, *e. g., Bailey* v. *Anderson, supra; Chicago, I. & L. R. Co.* v. *McGuire,* 196 U. S. 128, 131–133 (1905).

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[4] Also, we are unable to read the opinion of the Court of Appeals as reading the "words" clause out of the statute and authoritatively construing it to reach only the *act* of flag burning, whether as a protest or otherwise.

In this case, any want of presentation by the appellant must have occurred at the trial level, for there appears to be no doubt that the issue of the constitutionality of the "words" part of the statute was raised in appellant's briefs in both the Appellate Term and the Court of Appeals, and the State does not suggest the contrary. In the trial court, appellant's counsel raised the constitutional issues by means of the following motion:

> "Before we plead to this case I would like to make a motion to dismiss the information upon the ground it does not state facts to constitute a crime on the following grounds: The defendant was engaged in a constitutionally protected activity, to wit, freedom of speech. The allegation simply says that the defendant did wilfully and unlawfully set fire to an American flag and did say: 'If they did that to Meredith we don't need an American flag.' Under the first amendment of the Constitution of the United States and under the New York State constitution on freedom of speech they provide for protest in many forms, whether it be by burning a flag, demonstration or picketing. This is a form of demonstration and protest."

The motion was denied. It was renewed at the end of the State's case and at the end of the trial, and on both occasions was again denied.

The issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts.[5] However, it is not entirely clear whether in such cases the scope of our review is limited to determining whether the state court has "by-passed the federal right under forms of local procedure" or whether we should decide the matter "*de novo* for ourselves." *Ellis* v. *Dixon,* 349 U. S. 458, 463 (1955). In either event, we think appellant has met the burden of showing that the issue of the constitutionality of the "words" part of § 1425, subd. 16, par. d, was adequately raised in the state trial court. The motion quoted above explicitly referred to appellant's words. Appellant's counsel termed appellant's overall activity a "demonstration" or "protest," terms which encompass words as well as conduct. Indeed, if appellant's intention was to protest alleged governmental inaction in connection with the shooting of James Meredith, his words were an essential element, for without them no one would have known the object of his protest.

To the extent that the matter is governed by New York law, we have found no New York statutes or decisions which require that an issue be raised in the trial court with greater specificity than occurred here. In fact, in *People* v. *McLucas,* 15 N. Y. 2d 167, 172, 204 N. E. 2d 846, 848 (1965), the New York Court of Appeals held that when an appellant claims "deprivation of a fundamental constitutional right" New York appellate courts may review the correctness of a jury charge even though the appellant failed to except to the charge in the trial court. The Court of Appeals reached this result despite the fact that § 420-a of the New York Code of Criminal Procedure then required that an exception be taken "expressly" if the issue of the correctness of a jury charge was to be preserved for appellate review. In the present case, the right asserted by appellant was surely "fundamental," and under New York law a less precise objection was required than to a jury instruction.[6]

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[5] See, *e. g., Parker* v. *Illinois,* 333 U. S. 571, 574 (1948); *Carter* v. *Texas,* 177 U. S. 442, 447 (1900); R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court of the United States § 63, at 112 & n. 1 (R. Wolfson & P. Kurland ed. 1951), and other cases there cited.

Insofar as the question of sufficient presentation is one for our independent decision, the controlling principle was set forth in the leading case of *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 67 (1928):

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." (Footnote omitted.)

We think this requirement was satisfied by appellant's previously quoted motion in the trial court and his raising of the issue in the two appellate courts.[7] We therefore conclude that the question is properly before us.

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[6] At the time of appellant's trial, § 420-a of the New York Code of Criminal Procedure provided that with respect to trial rulings other than jury instructions:

"An exception shall be deemed to have been taken by the party adversely affected to every ruling either before or after the cause is finally submitted, when such party, at the time when such ruling is sought or made, makes known to the court or judge his position thereon by objection or otherwise."

II.

We next consider whether it is our duty to reverse if we find, as we do in Parts III and IV, *infra,* that Street's words could have been an independent cause of his conviction and that a conviction for uttering such words would violate the Constitution.

That such is our duty is made apparent by a number of decisions of this Court. In the leading case of *Stromberg* v. *California,* 283 U. S. 359 (1931), the appellant was convicted by a jury under a California statute making it an offense publicly to display a red flag for any one of three purposes. Finding that it would be unconstitutional to punish one who displayed for the first-named reason, this Court rejected the state court's reasoning that the appellant's conviction could nevertheless be sustained because the other two statutory reasons were severable and constitutional. This Court said:

> "The verdict against the appellant was a general one. It did not specify the ground upon which it rested. . . . [I]t is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses . . . was invalid, it can-

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[7] We find unpersuasive the State's argument that appellant's omission to raise the question of the constitutionality of the "words" provision is shown by his failure at any stage to invoke the exclusionary rule of *Miranda* v. *Arizona,* 384 U. S. 436 (1966), with respect to the admission of his words into evidence. For the State concedes that appellant's words were probative at least with respect to his unlawful intent in burning the flag, see Brief for Appellee 45–46, and appellant therefore would have had reason to invoke *Miranda* even had he believed the "words" part of the statute to be irrelevant.

> not be determined upon this record that the appellant was not convicted under that clause. . . . It follows that . . . the conviction cannot be upheld." *Id.,* at 367–368.

The principle established in *Stromberg* has been consistently followed. In *Williams* v. *North Carolina,* 317 U. S. 287 (1942), this Court again held itself compelled to reverse a conviction based upon a general jury verdict when the record failed to prove that the conviction was not founded upon a theory which could not constitutionally support a verdict. The Court stated:

> "To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground . . . would be to countenance a procedure which would cause a serious impairment of constitutional rights." *Id.,* at 292.

The rule was again applied in *Cramer* v. *United States,* 325 U. S. 1, 36, n. 45 (1945); *Terminiello* v. *Chicago,* 337 U. S. 1, 5–6 (1949); and *Yates* v. *United States,* 354 U. S. 298, 311 (1957).

It is true that in the present case the general verdict was rendered by a judge, not a jury. However, if the ground of the judge's decision cannot be ascertained from the record, then the danger of unconstitutional conviction is not significantly less than in the cases just discussed. Cf. *Thomas* v. *Collins,* 323 U. S. 516, 528–529 (1945). Nor would it be appropriate to remand the case to the trial judge for a *post hoc* explanation of the grounds of his decision. Cf. *Greyhound Lines* v. *Mealey,* 334 U. S. 653, 655 (1948). Hence, we conclude that the case is governed by the rule of *Stromberg,* and that appellant's conviction must be set aside if we find that it could have been based solely upon his words and that a conviction resting on such a basis would be unconstitutional—a matter to which we shall turn in a moment.

Moreover, even assuming that the record precludes the inference that appellant's conviction might have been based *solely* on his words, we are still bound to reverse if the conviction could have been based upon *both* his words and his act. This is made apparent by *Thomas* v. *Collins, supra.* The Court in that case noted that Thomas had been cited for contempt because during a meeting he allegedly had violated a court restraining order both by soliciting a single individual to join a union and by soliciting all nonunion men present. The Court found it unnecessary to consider the State's contention that the judgment could be sustained on the basis of the individual solicitation alone. The Court said:

> "The motion for the fiat in contempt was filed and the fiat itself was issued on account of both invitations. The order adjudging Thomas in contempt was in general terms, finding that he had violated the restraining order, without distinction between the solicitations set forth in the petition and proved as violations. The sentence was a single penalty. In this state of the record it must be taken that the order followed the prayer of the motion and the fiat's recital, and that the penalty was imposed on account of both invitations. The judgment therefore must be affirmed as to both or as to neither. Cf. *Williams* v. *North Carolina,* 317 U. S. 287, 292; *Stromberg* v. *California,* 283 U. S. 359, 368." 323 U. S., at 528–529. (Footnotes omitted.)

Finding that a conviction based upon the general solicitation could not stand, the Court reversed the entire conviction.[8]

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[8] There can be no doubt that the Court's disposition in *Thomas,* including its decision to reverse the conviction and not simply to

As in *Thomas,* appellant here was charged with two acts violative of the statute: burning a flag and publicly speaking defiant or contemptuous words about the flag; and evidence was introduced to show the commission of both acts. Here too the verdict was general and the sentence a single penalty. Hence, unless the record negates the possibility that the conviction was based on both alleged violations, *Thomas* dictates that "[t]he judgment . . . must be affirmed as to both or as to neither."

We take the rationale of *Thomas* to be that when a single-count indictment or information charges the commission of a crime by virtue of the defendant's having done both a constitutionally protected act and one which may be unprotected, and a guilty verdict ensues without elucidation, there is an unacceptable danger that the trier of fact will have regarded the two acts as "intertwined" and have rested the conviction on both together. See 323 U. S., at 528–529, 540–541. There is no comparable hazard when the indictment or information is in several counts and the conviction is explicitly declared to rest on findings of guilt on certain of those counts,[9] for in such instances there is positive evidence that the trier of fact considered each count on its own merits and separately from the others.

III.

We turn to considering whether appellant's words could have been the sole cause of his conviction, or whether

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remand for resentencing, was carefully considered. The case was originally argued during the 1943 Term but was ordered to be restored to the docket and reargued the following Term, with the parties directed to brief, *inter alia,* the question whether the general solicitation was a basis of Thomas' conviction.

[9] See, *e. g., Claassen* v. *United States,* 142 U. S. 140 (1891); *Pinkerton* v. *United States,* 328 U. S. 640 (1946); *Barenblatt* v. *United States,* 360 U. S. 109 (1959).

the conviction could have been based on both his words and his burning of the flag. As *Stromberg* teaches, we cannot take the opinion of the New York Court of Appeals as obviating our duty to examine the record for ourselves in order to ascertain whether the conviction may have rested upon such grounds. The sworn information which charged appellant with the crime of malicious mischief, and which is quoted more fully *supra,* at 579, recited not only that appellant had burned an American flag but also that he "[did] shout, 'If they did that to Meredith, We don't need an American Flag.' " Section 1425, subd. 16, par. d, the statute which appellant was charged with violating, made it a crime not only publicly to mutilate a flag but also "publicly [to] defy . . . or cast contempt upon [any American flag] by words."

The State argues that appellant's words were at most used to establish his unlawful intent in burning the flag.[10] However, after a careful examination of the comparatively brief trial record, we find ourselves unable to say with certainty that appellant's words were not an independent cause of his conviction. While it is true that at trial greater emphasis was placed upon appellant's action in burning the flag than upon his words, a police officer did testify to the utterance of the words. The State never announced that it was relying exclusively upon the burning. The trial judge never indicated during the trial that he regarded appellant's words as relating solely to intent. The judge found appellant guilty immediately after the end of the trial, and he delivered no oral or written opinion.

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[10] The State also contends that appellant's words could not have been a ground of conviction because they obviously were not spoken "publicly," as required by § 1425, subd. 16, par. d. However, although appellant testified that he spoke solely to a police officer, the officer himself gave evidence from which the trial judge might have concluded that appellant's remarks were made either to or within hearing of a small crowd. See *supra,* at 578–579. Moreover, the sworn information recited that appellant "shout[ed]" his words on a city street, thereby apparently satisfying the statutory requirement that the words be said "publicly."

Nor do we think it impossible for the trial judge to have found that by his statements, "We don't need no damn flag" and "If they let that happen to Meredith we don't need an American flag," appellant "def[ied] . . . or cast contempt upon [an American flag] by words" in violation of § 1425, subd. 16, par. d.

In the face of an information explicitly setting forth appellant's words as an element of his alleged crime, and of appellant's subsequent conviction under a statute making it an offense to speak words of that sort, we find this record insufficient to eliminate the possibility either that appellant's words were the sole basis of his conviction or that appellant was convicted for both his words and his deed.

IV.

We come finally to the question whether, in the circumstances of this case, New York may constitutionally inflict criminal punishment upon one who ventures "publicly [to] defy . . . or cast contempt upon [any American flag] by words . . . ."

The relevant evidence introduced at appellant's trial, considered in the light most favorable to the State, must be taken to establish the following. At the time of his arrest, appellant was standing on a street corner and speaking to a small crowd; on the opposite corner lay the burning flag. Appellant said to the crowd: "We don't need no damn flag"; and when questioned by a police officer appellant stated: "If they let that happen to Meredith we don't need an American flag." According to the officer, the crowds which gathered around appellant and around the flag did not obstruct the street or sidewalk and were neither unruly nor threatening.

In these circumstances, we can think of four governmental interests which might conceivably have been furthered by punishing appellant for his words: (1) an interest in deterring appellant from vocally inciting others to commit unlawful acts; (2) an interest in preventing appellant from uttering words so inflammatory that they would provoke others to retaliate physically against him, thereby causing a breach of the peace; (3) an interest in protecting the sensibilities of passers-by who might be shocked by appellant's words about the American flag; and (4) an interest in assuring that appellant, regardless of the impact of his words upon others, showed proper respect for our national emblem.

In the circumstances of this case, we do not believe that any of these interests may constitutionally justify appellant's conviction under § 1425, subd. 16, par. d, for speaking as he did. We begin with the interest in preventing incitement. Appellant's words, taken alone, did not urge anyone to do anything unlawful. They amounted only to somewhat excited public advocacy of the idea that the United States should abandon, at least temporarily, one of its national symbols. It is clear that the Fourteenth Amendment prohibits the States from imposing criminal punishment for public advocacy of peaceful change in our institutions. See, *e. g., Cox* v. *Louisiana* (*I*), 379 U. S. 536, 546–552 (1965); *Edwards* v. *South Carolina,* 372 U. S. 229, 237–238 (1963); *Terminiello* v. *Chicago,* 337 U. S. 1, 4–5 (1949); cf. *Yates* v. *United States,* 354 U. S. 298, 318–319 (1957). Even assuming that appellant's words might be found incitive when considered together with his simultaneous burning of the flag, § 1425, subd. 16, par. d, does not purport to punish only those defiant or contemptuous words which amount to incitement, and there is no evidence that the state courts regarded the statute as so limited. Hence, a conviction for words could not be upheld on this basis. See, *e. g., Yates* v. *United States, supra; Terminiello* v. *Chicago, supra.*

Nor could such a conviction be justified on the second ground mentioned above: the possible tendency of appellant's words to provoke violent retaliation. Though it is conceivable that some listeners might have been moved to retaliate upon hearing appellant's disrespectful words, we cannot say that appellant's remarks were so inherently inflammatory as to come within that small class of "fighting words" which are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 574 (1942). And even if appellant's words might be found within that category, § 1425, subd. 16, par. d, is not narrowly drawn to punish only words of that character, and there is no indication that it was so interpreted by the state courts. Hence, this case is again distinguishable from *Chaplinsky, supra,* in which the Court emphasized that the statute was "carefully drawn so as not unduly to impair liberty of expression . . . ." *Id.,* at 574. See also *Terminiello* v. *Chicago, supra.*

Again, such a conviction could not be sustained on the ground that appellant's words were likely to shock passers-by. Except perhaps for appellant's incidental use of the word "damn," upon which no emphasis was placed at trial,[11] any shock effect of appellant's speech must be attributed to the content of the ideas expressed. It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers. See, *e. g., Cox* v. *Louisiana (I), supra*; *Edwards* v. *South Carolina, supra; Terminiello* v. *Chicago, supra;* cf. *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940). And even if such a conviction might be upheld on the ground of "shock," there is again no indication that the state courts regarded the statute as limited to that purpose.

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[11] The State admits that there was only a "single and casual reference to this statement at the trial . . . ." Brief for Appellee 45.

Finally, such a conviction could not be supported on the theory that by making the above-quoted remarks about the flag appellant failed to show the respect for our national symbol which may properly be demanded of every citizen. In *Board of Educ.* v. *Barnette,* 319 U. S. 624 (1943), this Court held that to require unwilling schoolchildren to salute the flag would violate rights of free expression assured by the Fourteenth Amendment. In his opinion for the Court, Mr. Justice Jackson wrote words which are especially apposite here:

> "The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." *Id.,* at 641–642. (Footnote omitted.)

We have no doubt that the constitutionally guaranteed "freedom to be intellectually . . . diverse or even contrary," and the "right to differ as to things that touch the heart of the existing order," encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous.

Since appellant could not constitutionally be punished under § 1425, subd. 16, par. d, for his speech, and since we have found that he may have been so punished, his conviction cannot be permitted to stand. In so holding, we reiterate that we have no occasion to pass upon the validity of this conviction insofar as it was sustained by the state courts on the basis that Street could be punished for his burning of the flag, even though the burning was an act of protest. Nor do we perceive any basis for our Brother WHITE's fears that our decision today may be taken to require reversal whenever a defendant is convicted for burning a flag in protest, following a trial at which his words have been introduced to prove some element of that offense. Assuming that such a conviction would otherwise pass constitutional muster, a matter about which we express no view, nothing in this opinion would render the conviction impermissible merely because an element of the crime was proved by the defendant's words rather than in some other way. See *United States* v. *O'Brien,* 391 U. S. 367, 369–370, 376–377 (1968).

We add that disrespect for our flag is to be deplored no less in these vexed times than in calmer periods of our history. Cf. *Halter* v. *Nebraska,* 205 U. S. 34 (1907). Nevertheless, we are unable to sustain a conviction that may have rested on a form of expression, however distasteful, which the Constitution tolerates and protects.

For the reasons previously set forth, we reverse the judgment of the New York Court of Appeals and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. CHIEF JUSTICE WARREN, dissenting.

I dissent from the reversal of this judgment, not only because the Court in my opinion has strained to bring this trial within *Stromberg* v. *California,* 283 U. S. 359

(1931), but more particularly because it has declined to meet and resolve the basic question presented in the case. That question has been variously stated by the New York Court of Appeals and the parties. The court below employed the following statement of the question:

> "We are called upon to decide whether the deliberate act of burning an American flag in public as a 'protest' may be punished as a crime." [1]

Appellant tells us that the issue presented is:

> "May New York State constitutionally impose penal sanctions upon an individual charged with destroying or damaging an American flag in an attempt to dramatize his concern with social conditions existing in the country?" [2]

New York's statement of the issue is identical:

> "May the State of New York constitutionally impose penal sanctions upon one who is charged with publicly and deliberately desecrating an American flag as a means of dramatizing his dissatisfaction with social conditions existing within our Country?" [3]

Any distinctions between the above questions are without a significant difference. The parties obviously believe that the constitutionality of flag-desecration statutes is before the Court. The question posed by the Court of Appeals is the most succinct. Chief Judge Fuld, writing for a unanimous Court of Appeals, answered the question squarely; we should do likewise if we are to meet our responsibility. But the Court specifically refuses to decide this issue. Instead, it searches microscopically for the opportunity to decide the case on the peripheral *Stromberg* ground, holding that it is impossible to determine the basis for appellant's conviction. In my opinion a reading of the short trial record leaves no doubt that appellant was convicted solely for burning the American flag.

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[1] *People* v. *Street,* 20 N. Y. 2d 231, 234, 229 N. E. 2d 187, 189 (1967).

[2] Brief for Appellant 2. Appellant also suggests that the New York statute is unconstitutionally vague. The Court does not deal with this issue, nor do I.

[3] Brief for Appellee 5.

I.

From the beginning to the end of the proceedings below the parties placed only two matters in issue: (1) is burning the flag protected symbolic speech and (2) did appellant burn the flag for the purpose of casting contempt upon it or did he burn it in a dignified manner?[4] The information alleged that "Sidney Street did commit the crime of Malicious Mischief in that the defendant did wilfully and unlawfully defile, cast contempt upon and burn an American Flag, in violation of 1425-16-D of the Penal Law, under the following circumstances: On the aforesaid date, place and time, the defendant did wilfully and unlawfully set fire to an American Flag and shout, 'If they did that to Meredith, We don't need an American Flag.'" Although the Court stresses the mention of appellant's words in the information as indicative that he was convicted for uttering these words, the trial proceedings demonstrate that the words were employed only to show appellant's purpose in burning the flag.

At the outset of the trial appellant's counsel moved to dismiss the information, clearly revealing the theory of appellant's defense that flag burning is constitutionally protected and that appellant burned the flag in a dignified manner.

> "Mr. Goldstick [appellant's counsel]: Before we plead to this case I would like to make a motion to dismiss the information upon the ground it does not

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[4] The Appendix to this opinion reproduces in full those portions of the trial record which have any conceivable bearing upon the basis for the verdict.

state facts to constitute a crime on the following grounds: The defendant was engaged in a constitutionally protected activity, to wit, freedom of speech. The allegation simply says that the defendant did wilfully and unlawfully set fire to an American flag and did say: 'If they did that to Meredith we don't need an American flag.' Under the first amendment of the Constitution of the United States and under the New York State constitution on freedom of speech they provide for protest in many forms, whether it be by *burning a flag,* demonstration or picketing. This is a form of demonstration and protest.

"Court: You say *burning the flag* is a form of demonstration?

"Mr. Goldstick: Yes.

"Court: Motion denied.

"Mr. Goldstick: Also, there is a Federal statute which provides for *burning the flag.* I refer Your Honor—

"Court, interposing: So does Section 1425 provide for the lawful disposition of a flag!

"Mr. Goldstick, continuing: I refer Your Honor to page 6 of my brief, referring to the United States Code that a flag, when it is in such a condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by *burning.*

"Now, under the supremacy clause, if there is any conflict with any statute the Federal statute takes precedence; if a State law is in conflict with a Federal law the Federal law takes precedence. The Federal law provides you may *burn* an American flag; therefore, New York State is without power to make a complaint and convict a man for the *burning* of an American flag.

> "Court: Motions denied. The question here would be whether he *burned* it because it was in such poor condition that it should be *burned,* or if it was an illegal demonstration." (Emphasis added.)

Defense counsel insisted that burning the flag, an act he equated with a demonstration or picketing, was a form of speech for which his client could not be constitutionally punished. His colloquy with the trial judge does not give even the slightest suggestion that appellant was being prosecuted for words he might have spoken. That defense counsel believed that appellant's act, not his words, was at issue is further demonstrated by counsel's pre-emption argument. The federal statute to which counsel referred, 56 Stat. 377, c. 435, 36 U. S. C. § 173 *et seq.*, concerns the manner in which the flag is to be displayed and in § 4 (j), 56 Stat. 380, 36 U. S. C. § 176 (j), mandates that the flag, when no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning. At the time of appellant's trial the federal prohibition of flag desecration, which in all material particulars was identical to New York's, applied only to the District of Columbia and could therefore not have pre-empted state legislation on the same subject.[5]

The trial testimony confirms my belief that appellant's act was the sole basis for the verdict as it contains nothing to suggest that either the parties or the trial judge believed that appellant was on trial for his words. The arresting officer testified that, as he was investigating the source of a fire, he heard appellant say, "We don't need no damn flag." The officer then asked appellant whether he was responsible for the burning of the flag; appellant replied that he was and that: "If they let that happen to Meredith we don't need an American flag." The officer's testimony concluded with a description of the number of people in the vicinity and the extinguishing of the fire. During cross-examination of the officer, defense counsel asked not one question concerning what, if anything, appellant said.

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[5] See 4 U. S. C. § 3. Federal legislation enacting flag-desecration prohibitions on a national scale was not passed until July 5, 1968, two years after appellant's trial. This legislation specifically does not pre-empt state flag-burning statutes. See 82 Stat. 291, 18 U. S. C. § 700 (c) (1964 ed., Supp. IV).

Appellant did not dispute the prosecution's version of the facts. He testified that, hearing the news report of Meredith's shooting, he removed a flag from his dresser drawer, walked to the corner of St. James Place and Lafayette Avenue and burned the flag. According to appellant, he made no remarks to the crowd that had gathered and his reference to Meredith was made to the police officer. Cross-examination by the prosecution explored appellant's motivation for burning the flag; no mention was made of words appellant might have spoken.

We are told by the Court that at least in part appellant's conviction rests on his words. If it does, the trial record is strangely silent, for the State made no attempt to prove that appellant's words were heard by the crowd. Appellant insisted that he spoke only to the officer, yet the New York statute requires that the accused's flag desecration be public. The State argues, without contradiction by appellant, that words spoken to a policeman would not be spoken publicly for purposes of the statute.[6] I think it evident that appellant's words were mentioned in the indictment and introduced at trial only to show that he burned the flag with an intent to desecrate it, a necessary element of the State's case. In the absence of such evidence, the State would have proved that appellant burned a flag but would have left open the possibility that the burning was designed to destroy it in a dignified manner. The fact that appellant's words supplied an element of the State's case does not mean that he was convicted for uttering these words. See *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 498 (1949).

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[6] It appears that the New York courts would so construe their legislation. See *People* v. *La Sister,* 9 Misc. 2d 518, 170 N. Y. S. 2d 702 (Ct. Spec. Sess. 1958); cf. *State* v. *Peacock,* 138 Me. 339, 25 A. 2d 491 (1942).

Neither the prosecution nor the defense nor the New York courts attached any independent significance to his words. To interpret this record in any other manner ignores the very basic fact that the trial judge and the parties thought that there was one issue in this trial—whether appellant could be criminally punished for burning the flag. This record is not sufficiently ambiguous to justify the Court's speculation that the verdict below might rest even in part upon a conviction for appellant's words.

II.

I do not believe that the *Stromberg* line of cases allows us to avoid deciding whether flag burning is protected by the First Amendment. This case does not fit the *Stromberg* mold.

Miss Stromberg was one of the supervisors of a children's summer camp. She directed a daily ceremony during which the children raised the Soviet flag and recited a pledge of allegiance "to the worker's red flag." A California statute made it a criminal offense for any person to display a red flag (1) as a symbol of opposition to organized government or (2) as an invitation to anarchistic action or (3) as an aid to propaganda of a seditious character. The trial judge, following the express terms of the statute, charged that Miss Stromberg could be convicted if she displayed a red flag for any one of the three prohibited purposes. The Court first determined that a criminal conviction for display of a red flag as a symbol of opposition to organized government would impinge upon First Amendment freedoms. Since the jury charge was disjunctive, *i. e.,* Miss Stromberg could be convicted if the jury found that she conducted the ceremony for any of the three statutorily prohibited goals, it was possible that her conviction rested totally upon an act entitled to constitutional protection. Presumably, given the jury's general verdict, it could have convicted Miss Stromberg for raising a red flag solely as a symbol of opposition to organized government but not as either an invitation to anarchistic action or an aid to propaganda of a seditious character.

The teaching of *Stromberg* is that, if there is any possibility the general verdict below rests on speech or conduct entitled to constitutional protection, then the conviction must be reversed. The *Stromberg* analysis cannot be applied to appellant's conviction as the factual patterns in the two cases are distinct. The record leaves no doubt that appellant did burn the flag. Nor can appellant argue that his act was not an act of desecration. The trial judge emphatically stated that the issue was whether appellant burned the flag to destroy it in a dignified manner or to cast contempt upon it. Appellant's conviction therefore must be based upon a finding that he desecrated the flag by burning and neither he nor the Court suggests otherwise. We are not confronted with a jury trial and the consequent inability to determine the basis for the verdict below. The trial judge at the very outset of the trial made known his view that appellant's motivation for burning the flag was the probative issue. Combining this act of burning with a verbalization of the reasons for it does not allow the Court to avoid determining the constitutionality of appellant's conduct. Since there can be no claim that appellant was convicted for his speech, *Stromberg* simply does not apply.

My analysis is confirmed by an examination of the other cases upon which the Court relies. *Williams* v.

North Carolina, 317 U. S. 287 (1942), presents a factual pattern identical to *Stromberg.* Williams, a resident of North Carolina, obtained a Nevada divorce and then remarried in Nevada. Upon his return to North Carolina, Williams was convicted of bigamous cohabitation. The jury was charged that it could convict Williams if it found either that he procured the divorce based upon substituted service or that he went to Nevada not to establish a bona fide residence but rather to obtain a divorce through a fraud upon the Nevada courts. Holding that the Full Faith and Credit Clause required North Carolina to respect Williams' Nevada divorce even though acquired by substituted service, the Court reversed Williams' conviction since it was possible that the jury found the divorce was not procured by fraud yet convicted Williams. Under this state of facts, the conviction could have been based upon the acquisition of a divorce North Carolina was constitutionally compelled to honor.

Terminiello v. *Chicago,* 337 U. S. 1 (1949), reflects the same approach. Terminiello was charged with disorderly conduct. The jury was allowed to convict if it found that Terminiello's speech either stirred the public to anger or constituted "fighting words." Since only the latter may be constitutionally prohibited, the Court reversed. It was possible that the jury found that Terminiello's speech merely stirred the public to anger yet convicted him. Terminiello could have been convicted for constitutionally protected conduct; he was therefore entitled to a reversal. *Yates* v. *United States,* 354 U. S. 298 (1957), also conforms to this pattern. Charged with a violation of the Smith Act, Yates was convicted under instructions which made either "advocacy" or "organizing" a statutory violation. The Court decided that the jury instruction with regard to the organizing charge was erroneous; since the jury could have convicted Yates for organizing even if it found that he was not guilty of advocacy, the conviction was reversed.

The Court does not, however, base its reversal only upon a misapplication of *Stromberg*. Relying also on *Thomas* v. *Collins*, 323 U. S. 516 (1945), the Court holds that even if "the record precludes the inference that appellant's conviction might have been based *solely* on his words, we are still bound to reverse if the conviction could have been based upon *both* his words and his act." *Ante*, at 587. My reading of *Thomas* v. *Collins* indicates, however, that *Thomas* does not serve as justification for the Court's disposition of this case.[7] In *Thomas* a union organizer was held in contempt, fined, and imprisoned for disobeying a state court order enjoining him from violating a Texas statute. The statute required that labor organizers register with and procure an organizer's card from a designated Texas official before soliciting memberships in labor unions. Without either registering or procuring a card, the organizer made a speech before a group of workers. He extolled the virtues of union membership in general terms and also asked a specific individual to become a union member. As I read the case, *Thomas* holds that both the general solicitation and the solicitation of a named individual were within the protection of the First Amendment:

> "The occasion was clearly protected. The speech was an essential part of the occasion, unless all meaning and purpose were to be taken from it. And the invitations, both general and particular, were parts of the speech, inseparable incidents of

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[7] I need not consider to what extent the *Thomas* Court's implicit assumption that Thomas could test the constitutionality of the restraining order without first attempting to secure judicial relief is inconsistent with *Walker* v. *City of Birmingham*, 388 U. S. 307 (1967); see *id.*, at 336 (DOUGLAS, J., dissenting).

> the occasion and of all that was said or done. . . . How one might 'laud unionism,' as the State and the State Supreme Court concede Thomas was free to do, yet in these circumstances not imply an invitation, is hard to conceive. This is the nub of the case, which the State fails to meet because it cannot do so." *Id.*, at 534–535.

Having so held, it was unnecessary for the Court to determine if an individual solicitation could have been enjoined. The union organizer therefore was entitled to relief without regard to whether his conviction was based upon the general or the individual solicitation.

I reiterate my belief that appellant was convicted for his act not his words. *Stromberg* and the cases based upon it do not allow us the luxury of refusing to treat appellant's claim that the burning of the flag as a protest is worthy of constitutional protection.

III.

I am in complete agreement with the general rule that this Court should not treat broad constitutional questions when narrow ones will suffice to dispose of the litigation. However, where only the broad question is presented, it is our task and our responsibility to confront that question squarely and resolve it. In a time when the American flag has increasingly become an integral part of public protests, the constitutionality of the flag-desecration statutes enacted by all of the States[8] and Congress[9] is a matter of the most widespread concern. Both those who seek constitutional shelter for acts of flag desecration perpetrated in the course of a political protest and those who must enforce the law are entitled to know the scope of constitutional protection. The Court's explicit reservation of the constitutionality of flag-burning prohibitions encourages others to test in the streets the power of our States and National Government to impose criminal sanctions upon those who would desecrate the flag.

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[8] Desecration of the Flag, Hearings on H. R. 271 before Subcommittee No. 4 of the House Committee on the Judiciary, 90th Cong., 1st Sess., ser. 4, 324–346 (1967).

[9] 82 Stat. 291, 18 U. S. C. § 700 (1964 ed., Supp. IV).

I believe that the States and the Federal Government do have the power to protect the flag from acts of desecration and disgrace. But because the Court has not met the issue, it would serve no purpose to delineate my reasons for this view. However, it is difficult for me to imagine that, had the Court faced this issue, it would have concluded otherwise. Since I am satisfied that the constitutionality of appellant's conduct should be resolved in this case and am convinced that this conduct can be criminally punished, I dissent.

APPENDIX TO OPINION OF WARREN, C. J., DISSENTING.

> "Mr. Goldstick [appellant's counsel]: Before we plead to this case I would like to make a motion to dismiss the information upon the ground it does not state facts to constitute a crime on the following grounds: The defendant was engaged in a constitutionally protected activity, to wit, freedom of speech. The allegation simply says that the defendant did wilfully and unlawfully set fire to an American flag and did say: 'If they did that to Meredith we don't need an American flag.' Under the first amendment of the Constitution of the United States and under the New York State constitution on freedom of speech they provide for protest in many forms, whether it be by burning a flag, demonstration or picketing. This is a form of demonstration and protest.

"Court: You say burning the flag is a form of demonstration?

"Mr. Goldstick: Yes.

"Court: Motion denied.

"Mr. Goldstick: Also, there is a Federal statute which provides for burning the flag. I refer Your Honor—

"Court, interposing: So does Section 1425 provide for the lawful disposition of a flag!

"Mr. Goldstick, continuing: I refer Your Honor to page 6 of my brief, referring to the United States Code that a flag, when it is in such a condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning.

"Now, under the supremacy clause, if there is any conflict with any statute the Federal statute takes precedence; if a State law is in conflict with a Federal law the Federal law takes precedence. The Federal law provides you may burn an American flag; therefore, New York State is without power to make a complaint and convict a man for the burning of an American flag.

"Court: Motions denied. The question here would be whether he burned it because it was in such poor condition that it should be burned, or if it was an illegal demonstration.

"Mr. Goldstick: Under the supremacy—

"Court, interposing: Next motion!

"No more argument, please!

"Mr. Goldstick: I plead the defendant not guilty and take exception to Your Honor's rulings.

"Court: Proceed! You may sit down, counselor! Now, we have two cases! One is Disorderly Conduct and one is Malicious Mischief.

"Mr. Goldstick: I see nothing in the information regarding a charge of Disorderly Conduct.

"Court: We have two charges before me!

"Show the complaints to counsel!

"Mr. Bonomo [the prosecutor]: We have two separate complaints! (Handing papers to Mr. Goldstick.)

"Mr. Goldstick: I plead not guilty to the Disorderly Conduct charge, too, Your Honor.

"Court: Are you ready for trial in each case?

"Mr. Goldstick: Yes.

"Court: Do you stipulate that the two cases will be tried together and the facts adduced in one will be applied to the other wherever necessary, and there will be separate findings on the facts and the law and separate judgments may be rendered?

"Mr. Goldstick: I so stipulate.

"Court: Let us proceed!

"Mr. Bonomo: I will call Patrolman James Copeland!"

[Officer Copeland testified on direct examination concerning the investigation of the source of a fire and his subsequent discovery that appellant had burned a flag.]

. . . . .

"Mr. Bonomo: That's all!

"Mr. Goldstick: Before I cross-examine I move to dismiss both charges upon the ground the People failed to make out a prima facie case.

"Court: Are you going to cross-examine?

"Mr. Goldstick: Yes, but I am making a motion before cross-examination!

"Court: You better cross-examine!"

[The cross-examination of Officer Copeland explored the size of the crowd that had gathered; no mention was made of appellant's words.]

. . . . .

"Mr. Goldstick: No further questions.

"Mr. Bonomo: People's case, in each case!

"Mr. Goldstick: I renew my motions to dismiss upon the ground the People failed to prove a prima facie case.

"Court: Motion denied as to each case.

"Mr. Goldstick: Exception. The defendant will take the stand!"

[Appellant then gave his version of the incident. Reproduced below is his testimony concerning the words spoken.]

* * * * *

"Q. Did the officer speak to you or did you speak to him? A. He spoke to me.

"Q. What did he say? A. He asked me if I set fire to the flag. I said yes.

"Q. Then what happened? A. I said: 'If they do what they had [*sic*] to Meredith we don't need this flag.'

"Q. While you were burning this flag did anybody say anything to you other than this police officer? A. Nobody.

"Q. Did anybody stop? A. I noticed no unusual crowd.

"Q. Where is that corner? A. St. James and Lafayette.

"Q. Were you on the curb or in the street? A. I was on the curb. The flag was laying on the curb.

"Q. When the police officer came up to you were you still by the flag? A. Yes.

"Q. The flag was still burning when the officer came? A. Yes.

"Q. Other than saying to the police officer 'if they did that to Meredith we don't need an American flag,' did you speak to anybody else at the time? A. No.

"Mr. Goldstick: No further questions!"

[Cross-examination of appellant contains no reference to any of his words.]

* * * * *

"Mr. Bonomo: That's all!

"Mr. Goldstick: The defendant rests.

"Mr. Bonomo: The People rest.

"Mr. Goldstick: I move to dismiss on all the constitutional grounds previously made, on all the grounds provided for in the Code of Criminal Procedure, and also upon the ground the People failed to prove a case beyond a reasonable doubt.

"Court: On the charge of Disorderly Conduct the defendant is acquitted; on the charge of Malicious Mischief the defendant is convicted.

"Mr. Goldstick: May we have next Tuesday for sentence?

"Court: No, that is not enough time! August 9th for sentence; bail continued."

Mr. Justice Black, dissenting.

I agree with the excellent opinion written by Chief Judge Fuld for a unanimous Court of Appeals, upholding the New York statute which this Court now holds unconstitutional as applied. The entire state court construed the statute as applied to this appellant as making it an offense publicly to burn an American flag in order to protest something that had occurred. In other words the offense which that court sustained was the burning of the flag and not the making of any statements about it. The Court seems to console itself for holding this New York flag-burning law unconstitutional as applied by saying that, as it reads the record, the conviction could have been based on the words spoken by the appellant as he was burning the flag. Those words indicated a desire on appellant's part to degrade and defame the flag. If I could agree with the Court's interpretation of the record as to the possibility of the conviction's resting on these spoken words, I would firmly and automatically agree that the law is unconstitutional. I would not feel constrained, as the Court seems to be, to search my imagination to see if I could think of interests the State may have in suppressing this freedom of speech. I would not balance away the First Amendment mandate that speech not be abridged in any fashion whatsoever. But I accept the unanimous opinion of the New York Court of Appeals that the conviction does not and could not have rested merely on the spoken words but that it rested entirely on the fact that the defendant had publicly burned the American flag—against the law of the State of New York.

It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American flag an offense. It is immaterial to me that words are spoken in connection with the burning. It is the *burning* of the flag that the State has set its face against. "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 498 (1949). In my view this quotation from the *Giboney* case precisely applies here. The talking that was done took place "as an integral part of conduct in violation of a valid criminal statute" against burning the American flag in public. I would therefore affirm this conviction.

MR. JUSTICE WHITE, dissenting.

The Court has spun an intricate, technical web but I fear it has ensnared itself in its own remorseless logic and arrived at a result having no support in the facts of the case or the governing law.

The Court's schema is this: the statute forbids insults to the flag either by act or words; the charge alleged both flag burning and speech; the court rendered a general judgment; since the conviction might logically have been for speech alone or for both words and deeds and since in either event the conviction is invalid, the judgment of the New York courts must be set aside without passing upon the validity of a conviction for burning the flag.[1] I reach precisely the opposite conclusion; before Street's conviction can be either reversed or affirmed, the Court *must* reach and decide the validity of a conviction for flag burning.

I reject first the Court's suggestion that we must assume from the trial court's judgment—which was that "on the charge of Malicious Mischief the defendant is convicted"—that Street might have been convicted for speech alone. True, the complaint referred to both burning and speaking and the statute permits conviction for either insulting words or physical desecration. But surely the Court has its tongue in its cheek when it infers from this record the possibility that Street was not convicted for burning the flag but only for the words he uttered. It is a distortion of the record to read it in this manner, as THE CHIEF JUSTICE convincingly demonstrates. But even if it were fair to infer that he was convicted for speaking as well as burning, it is sheer fancy to conclude that the trial court convicted him for speech alone and acquitted him of flag burning. The appellant does not seriously argue such a claim; his major point is that he *was* convicted for burning as a protest and that such a conviction cannot stand. The Court of Appeals of New York characterized the issue before it as whether the defendant could be validly convicted for burning the flag as a protest. Moreover, without clear indication from the state courts, I would not assume that the particular words which Street spoke in this case would be deemed within the coverage of the statute. In any event, if Street was convicted for speaking, he most certainly was also convicted for flag burning. Hence, *Stromberg* v. *California*, 283 U. S. 359 (1931), and like cases to which I adhere, have no application by their own terms.

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[1] The Court's theory is not that of unconstitutional overbreadth; it does not argue that New York may not convict for burning because the entire statute is unconstitutional for permitting convictions for insulting speech as well as for the act of flag burning.

I reject also the proposition that if Street was convicted for both burning and talking, his conviction must be reversed if the speech conviction is unconstitutional. The Court initially cites *Thomas* v. *Collins*, 323 U. S. 516 (1945), for the rule that where two acts violative of a statute are charged, a verdict of guilty on both acts and a single sentence must be reversed if conviction for either act is invalid. This has never been the prevailing rule in this country or in this Court, either before or after *Thomas* v. *Collins*. The Court in that case cited no authority for the proposition other than *Stromberg* and *Williams* v. *North Carolina*, 317 U. S. 287 (1942), neither of which announced that rule. I am not convinced that the rule stated by the *Thomas* Court was necessary for reversal, but whether dictum or not the rule on which the Court relies today is at odds with many cases in this Court.

Claassen v. *United States*, 142 U. S. 140, 146–147 (1891), speaks for the law at that time:

> "And it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only. *Locke* v. *United States*, 7 Cranch 339, 344; *Clifton* v. *United States*, 4 How.

> 242, 250; *Snyder* v. *United States,* 112 U. S. 216; *Bond* v. *Dustin,* 112 U. S. 604, 609; 1 Bishop Crim. Pro. § 1015; Wharton Crim. Pl. & Pract. § 771."

Many years later, in *Barenblatt* v. *United States,* 360 U. S. 109 (1959), the Court was equally clear. There the defendant was indicted in five counts for contempt in refusing to answer questions put by a congressional committee. The case was tried to a court without a jury and upon conviction under all counts a general sentence of six months' imprisonment and a fine of $200 was imposed. Because the conviction on at least some of the counts was warranted, the judgment was affirmed. Relying on *Claassen* among other cases, the Court said:

> "Since this sentence was less than the maximum punishment authorized by the statute for conviction under any one Count, the judgment below must be upheld if the conviction upon any of the Counts is sustainable." 360 U. S., at 115. (Footnote omitted.)

There are a host of other cases to the same effect.[2]

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[2] *E. g., Pinkerton* v. *United States,* 328 U. S. 640, 641–642, n. 1 (1946); *Whitfield* v. *Ohio,* 297 U. S. 431, 438 (1936); *Sinclair* v. *United States,* 279 U. S. 263, 299 (1929); *Abrams* v. *United States,* 250 U. S. 616, 619 (1919); *Ballew* v. *United States,* 160 U. S. 187, 197–203 (1895); *Goode* v. *United States,* 159 U. S. 663, 669 (1895); *Evans* v. *United States,* 153 U. S. 584, 595 (1894); *Evans* v. *United States,* 153 U. S. 608 (1894). This Court has recognized the applicability of the same rule to court-martial proceedings, *Carter* v. *McClaughry,* 183 U. S. 365, 384–387 (1902); to forfeiture actions, *Snyder* v. *United States,* 112 U. S. 216, 217 (1884), *Clifton* v. *United States,* 4 How. 242, 250 (1846), *Locke* v. *United States,* 7 Cranch 339, 344 (1813); and to civil cases under state law, *Bond* v. *Dustin,* 112 U. S. 604, 609 (1884). In *United States* v. *Gainey,* 380 U. S. 63, 65 (1965), the Court applied the related concurrent sentence rule to a general sentence on a guilty verdict on an indictment charging several counts. See Transcript of Record 48–50, No. 13, October Term, 1964.

Even accepting the notion that where there is a conviction on each of several counts and a general sentence is imposed, affirmance requires upholding the conviction on each and every count, the rule would have no application to the facts of this case. Such a rule would be based on the notion that the trial judge might have given a lesser sentence if he had known that some of the counts were infirm. Reversal of the judgment on less than all the counts would call only for resentencing, not for reversal of the convictions on the other counts.

Viewed in this light, the judgment of the New York courts, insofar as it convicted Street for flag burning, cannot be reversed simply because Street was also convicted for speaking and a general sentence was given. Neither can the case be remanded for resentencing since no sentence was imposed. Sentence was suspended under the then applicable New York law and the time for imposing a sentence had expired even before the judgment was reviewed in the New York Court of Appeals.

Recognizing the aberrance of *Thomas,* the Court now gives that case a new and more confusing gloss. The general finding of guilt for both speaking at a meeting and for an individual solicitation was reversed, we are told, because the speech and solicitation were intertwined, making it uncertain that there was or would have been a judgment of guilty on the solicitation alone. Aside from the fact that *Thomas* itself said the penalty was imposed for *both violations,* the rationale which the Court extracts from the facts and judgment in that case hardly qualifies as a constitutional standard to be applied willy-nilly in all cases where there is a general verdict on a count charging dual violations. The Court is capable of more discriminating judgment than to insist on its newly fashioned doctrine in a case like Street's where it is so clear that there was at least a conviction for a public burning of the American flag.

The Court is obviously wrong in reversing the judgment below because it believes that Street was unconstitutionally convicted for speaking. Reversal can follow only if the Court reaches the conviction for flag burning and finds that conviction, as well as the assumed conviction for speech, to be violative of the First Amendment.[3] For myself, without the benefit of the majority's thinking if it were to find flag burning protected by the First Amendment, I would sustain such a conviction. I must dissent.

MR. JUSTICE FORTAS, dissenting.

I agree with the dissenting opinion filed by THE CHIEF JUSTICE, but I believe that it is necessary briefly to set forth the reasons why the States and the Federal Government have the power to protect the flag from acts of desecration committed in public.

If the national flag were nothing more than a chattel, subject only to the rules governing the use of private personalty, its use would nevertheless be subject to certain types of state regulation. For example, regulations concerning the use of chattels which are reasonably designed to avoid danger to life or property, or impingement upon the rights of others to the quiet use of their property and of public facilities, would unquestionably be a valid exercise of police power. They would not necessarily be defeated by a claim that they conflicted with the rights of the owner of the regulated property. See, *e. g., Village of Euclid* v. *Ambler Realty Co.,* 272 U. S. 365 (1926); *Berman* v. *Parker,* 348 U. S. 26 (1954).

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[3] Arguably, under today's decision any conviction for flag burning where the defendant's words are critical to proving intent or some other element of the crime would be invalid since the conviction would be based in part on speech. The Court disclaims this result, but without explaining why it would not reverse a conviction for burning where words spoken at the time are necessarily used to prove a case and yet reverse burning convictions on precisely the same evidence simply because on that evidence the defendant might also have been convicted for speaking. The Court's seemingly narrow holding may be of potentially broader application, particularly in view of *Thomas* v. *Collins* as now rewritten by the Court.

If a state statute provided that it is a misdemeanor to burn one's shirt or trousers or shoes on the public thoroughfare, it could hardly be asserted that the citizen's constitutional right is violated. If the arsonist asserted that he was burning his shirt or trousers or shoes as a protest against the Government's fiscal policies, for example, it is hardly possible that his claim to First Amendment shelter would prevail against the State's claim of a right to avert danger to the public and to avoid obstruction to traffic as a result of the fire. This is because action, even if clearly for serious protest purposes, is not entitled to the pervasive protection that is given to speech alone. See *Cantwell* v. *Connecticut,* 310 U. S. 296, 303–304 (1940). It may be subjected to reasonable regulation that appropriately takes into account the competing interests involved.

The test that is applicable in every case where conduct is restricted or prohibited is whether the regulation or prohibition is reasonable, due account being taken of the paramountcy of First Amendment values. If, as I submit, it is permissible to prohibit the burning of personal property on the public sidewalk, there is no basis for applying a different rule to flag burning. And the fact that the law is violated for purposes of protest does not immunize the violator. *United States* v. *O'Brien,* 391 U. S. 367 (1968); see *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490 (1949).

Beyond this, however, the flag is a special kind of personalty. Its use is traditionally and universally subject to special rules and regulation. As early as 1907, this Court affirmed the constitutionality of a state statute making it a crime to use a representation of the United

States flag for purposes of advertising. *Halter* v. *Nebraska,* 205 U. S. 34 (1907). Statutes prescribe how the flag may be displayed; how it may lawfully be disposed of; when, how, and for what purposes it may and may not be used. See, *e. g.,* 4 U. S. C. § 3; 56 Stat. 377, c. 435, 36 U. S. C. §§ 172–177. A person may "own" a flag, but ownership is subject to special burdens and responsibilities. A flag may be property, in a sense; but it is property burdened with peculiar obligations and restrictions. Certainly, as *Halter* v. *Nebraska, supra,* held, these special conditions are not *per se* arbitrary or beyond governmental power under our Constitution.

One may not justify burning a house, even if it is his own, on the ground, however sincere, that he does so as a protest. One may not justify breaking the windows of a government building on that basis. Protest does not exonerate lawlessness. And the prohibition against flag burning on the public thoroughfare being valid, the misdemeanor is not excused merely because it is an act of flamboyant protest.

SHAPIRO, COMMISSIONER OF WELFARE OF CONNECTICUT *v.* THOMPSON.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT.

No. 9. Argued May 1, 1968.—Reargued October 23–24, 1968.—Decided April 21, 1969.*

These appeals are from decisions of three-judge District Courts holding unconstitutional Connecticut, Pennsylvania, or District of Columbia statutory provisions which deny welfare assistance to persons who are residents and meet all other eligibility requirements except that they have not resided within the jurisdiction for at least a year immediately preceding their applications for assistance. Appellees' main contention on reargument is that the prohibition of benefits to residents of less than one year creates a classification which constitutes an invidious discrimination denying them equal protection of the laws. Appellants argue that the waiting period is needed to preserve the fiscal integrity of their public assistance programs, as persons who require welfare assistance during their first year of residence are likely to become continuing burdens on welfare programs. Appellants also seek to justify the classification as a permissible attempt to discourage indigents from entering a State solely to obtain larger benefits, and to distinguish between new and old residents on the basis of the tax contributions they have made to the community. Certain appellants rely in addition on the following administrative and related governmental objectives: facilitating the planning of welfare budgets, providing an objective test of residency, minimizing the opportunity for recipients fraudulently to receive payments from more than one jurisdiction, and encouraging early entry of new residents into the labor force. Connecticut and Pennsylvania also argue that Congress approved the imposition of the one-year requirement in § 402 (b) of the Social Security Act. *Held:*

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*Together with No. 33, *Washington et al.* v. *Legrant et al.*, on appeal from the United States District Court for the District of Columbia, argued May 1, 1968, and No. 34, *Reynolds et al.* v. *Smith et al.*, on appeal from the United States District Court for the Eastern District of Pennsylvania, argued May 1–2, 1968, both reargued on October 23–24, 1968.

1. The statutory prohibition of benefits to residents of less than a year creates a classification which denies equal protection of the laws because the interests allegedly served by the classification either may not constitutionally be promoted by government or are not compelling governmental interests. P. 627.

2. Since the Constitution guarantees the right of interstate movement, the purpose of deterring the migration of indigents into a State is impermissible and cannot serve to justify the classification created by the one-year waiting period. Pp. 629–631.

3. A State may no more try to fence out those indigents who seek higher welfare payments than it may try to fence out indigents generally. Pp. 631–632.

4. The classification may not be sustained as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes because the Equal Protection Clause prohibits the States from apportioning benefits or services on the basis of the past tax contributions of its citizens. Pp. 632–633.

5. In moving from jurisdiction to jurisdiction appellees were exercising a constitutional right, and any classification which penalizes the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional. P. 634.

6. Appellants do not use and have no need to use the one-year requirement for the administrative and governmental purposes suggested, and under the standard of a *compelling* state interest, that requirement clearly violates the Equal Protection Clause. Pp. 634–638.

7. Section 402 (b) of the Social Security Act does not render the waiting-period requirements constitutional. Pp. 638–641.

(a) That section on its face does not approve, much less prescribe, a one-year requirement, and the legislative history reveals that Congress' purpose was to curb hardships resulting from excessive residence requirements and not to approve or prescribe any waiting period. Pp. 639–640.

(b) Assuming, *arguendo,* that Congress did approve the use of a one-year waiting period, it is the responsive *state* legislation and not § 402 (b) which infringes constitutional rights. P. 641.

(c) If the constitutionality of § 402 (b) were at issue, that provision, insofar as it permits the one-year waiting period, would be unconstitutional, as Congress may not authorize the States to violate the Equal Protection Clause. P. 641.

8. The waiting-period requirement in the District of Columbia Code, adopted by Congress as an exercise of federal power, is an unconstitutional discrimination which violates the Due Process Clause of the Fifth Amendment. Pp. 641–642.

No. 9, 270 F. Supp. 331; No. 33, 279 F. Supp. 22; and No. 34, 277 F. Supp. 65, affirmed.

Francis J. MacGregor, Assistant Attorney General of Connecticut, argued the cause for appellant in No. 9 on the original argument and on the reargument. With him on the brief on the original argument was *Robert K. Killian,* Attorney General. *Richard W. Barton* argued the cause for appellants in No. 33 on the original argument and on the reargument. With him on the brief on the original argument were *Charles T. Duncan* and *Hubert B. Pair. William C. Sennett,* Attorney General of Pennsylvania, argued the cause for appellants in No. 34 on the original argument and on the reargument. With him on the brief on the reargument was *Edgar R. Casper,* Deputy Attorney General, and on the original argument were *Mr. Casper* and *Edward Friedman.*

Archibald Cox argued the cause for appellees in all three cases on the reargument. With him on the brief were *Peter S. Smith* and *Howard Lesnick. Brian L. Hollander* argued the cause *pro hac vice* for appellee in No. 9 on the original argument. With him on the brief were *Norman Dorsen* and *William D. Graham. Mr. Smith* argued the cause for appellees in No. 33 on the original argument. With him on the brief were *Joel J. Rabin, Jonathan Weiss,* and *Joseph F. Dugan. Thomas K. Gilhool* argued the cause *pro hac vice* for appellees in No. 34 on the original argument. With him on the brief were *Harvey N. Schmidt, Paul Bender,* and *Mr. Lesnick.*

Lorna Lawhead Williams, Special Assistant Attorney General, argued the cause for the State of Iowa as *amicus curiae* in support of appellants in all three cases on the original argument and on the reargument. With her on the briefs on the original argument was *Richard C. Turner,* Attorney General.

Briefs of *amici curiae* in support of appellant in No. 9 were filed by *David P. Buckson,* Attorney General, and *Ruth M. Ferrell,* Deputy Attorney General, for the State of Delaware; by *William B. Saxbe,* Attorney General, *Winifred A. Dunton,* Assistant Attorney General, and *Charles S. Lopeman* for the State of Ohio; by *Crawford C. Martin,* Attorney General, *Nola White,* First Assistant Attorney General, *A. J. Carubbi, Jr.,* Executive Assistant Attorney General, and *J. C. Davis, John Reeves,* and *Pat Bailey,* Assistant Attorneys General, for the State of Texas; and by *Thomas C. Lynch,* Attorney General, and *Elizabeth Palmer,* Deputy Attorney General, for the State of California.

Briefs of *amici curiae* in support of appellee in No. 9 were filed by *Arthur L. Schiff* for Bexar County Legal Aid Association; by *Eugene M. Swann* for the Legal Aid Society of Alameda County; and by *A. L. Wirin, Fred Okrand, Laurence R. Sperber,* and *Melvin L. Wulf* for the American Civil Liberties Union et al. Brief of *amicus curiae* in support of appellees in No. 33 was filed by *John F. Nagle* for the National Federation of the Blind. Briefs of *amici curiae* in support of appellees in all three cases were filed by *J. Lee Rankin* and *Stanley Buchsbaum* for the City of New York; by *Joseph B. Robison, Carlos Israels,* and *Carl Rachlin* for the American Jewish Congress et al.; and by *Charles L. Hellman* and *Leah Marks* for the Center on Social Welfare Policy and Law et al.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

These three appeals were restored to the calendar for reargument. 392 U. S. 920 (1968). Each is an appeal from a decision of a three-judge District Court holding unconstitutional a State or District of Columbia statutory provision which denies welfare assistance to residents of the State or District who have not resided within their jurisdictions for at least one year immediately preceding their applications for such assistance.[1] We affirm the judgments of the District Courts in the three cases.

I.

In No. 9, the Connecticut Welfare Department invoked § 17–2d of the Connecticut General Statutes[2] to deny the application of appellee Vivian Marie Thompson for assistance under the program for Aid to Families with Dependent Children (AFDC). She was a 19-year-old unwed mother of one child and pregnant with her second child when she changed her residence in June 1966 from Dorchester, Massachusetts, to Hartford, Connecticut, to live with her mother, a Hartford resident. She moved to her own apartment in Hartford in August 1966, when her mother was no longer able to support her and her infant son. Because of her pregnancy, she was unable to work or enter a work training program. Her application for AFDC assistance, filed in August, was denied in November solely on the ground that, as required by § 17–2d, she had not lived in the State for a year before her application was filed. She brought this action in the District Court for the District of Connecticut where a three-judge court, one judge dissenting, declared § 17–2d unconstitutional. 270 F. Supp. 331 (1967). The majority held that the waiting-period requirement is unconstitutional because it "has a chilling effect on the right to travel." *Id.*, at 336. The majority also held that the provision was a violation of the Equal Protection Clause of the Fourteenth Amendment because the denial of relief to those resident in the State for less than a year is not based on any permissible purpose but is solely designed, as "Connecticut states quite frankly," "to protect its fisc by discouraging entry of those who come needing relief." *Id.*, at 336–337. We noted probable jurisdiction. 389 U. S. 1032 (1968).

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[1] Accord: *Robertson* v. *Ott,* 284 F. Supp. 735 (D. C. Mass. 1968); *Johnson* v. *Robinson,* Civil No. 67–1883 (D. C. N. D. Ill., Feb. 20, 1968); *Ramos* v. *Health and Social Services Bd.,* 276 F. Supp. 474 (D. C. E. D. Wis. 1967); *Green* v. *Dept. of Pub. Welfare,* 270 F. Supp. 173 (D. C. Del. 1967). Contra: *Waggoner* v. *Rosenn,* 286 F. Supp. 275 (D. C. M. D. Pa. 1968); see also *People ex rel. Heydenreich* v. *Lyons,* 374 Ill. 557, 30 N. E. 2d 46 (1940).

All but one of the appellees herein applied for assistance under the Aid to Families with Dependent Children (AFDC) program which was established by the Social Security Act of 1935. 49 Stat. 627, as amended, 42 U. S. C. §§ 601–609. The program provides partial federal funding of state assistance plans which meet certain specifications. One appellee applied for Aid to the Permanently and Totally Disabled which is also jointly funded by the States and the Federal Government. 42 U. S. C. §§ 1351–1355.

[2] Conn. Gen. Stat. Rev. § 17–2d (1965 Supp.), now § 17–2c, provides:

"When any person comes into this state without visible means of support for the immediate future and applies for aid to dependent children under chapter 301 or general assistance under part I of chapter 308 within one year from his arrival, such person shall be eligible only for temporary aid or care until arrangements are made for his return, provided ineligibility for aid to dependent children shall not continue beyond the maximum federal residence requirement."

An exception is made for those persons who come to Connecticut with a bona fide job offer or are self-supporting upon arrival in the State and for three months thereafter. 1 Conn. Welfare Manual, c. II, §§ 219.1–219.2 (1966).

In No. 33, there are four appellees. Three of them—appellees Harrell, Brown, and Legrant—applied for and were denied AFDC aid. The fourth, appellee Barley, applied for and was denied benefits under the program for Aid to the Permanently and Totally Disabled. The denial in each case was on the ground that the applicant had not resided in the District of Columbia for one year immediately preceding the filing of her application, as required by § 3–203 of the District of Columbia Code.[3]

Appellee Minnie Harrell, now deceased, had moved with her three children from New York to Washington in September 1966. She suffered from cancer and moved to be near members of her family who lived in Washington.

Appellee Barley, a former resident of the District of Columbia, returned to the District in March 1941 and was committed a month later to St. Elizabeths Hospital as mentally ill. She has remained in that hospital ever since. She was deemed eligible for release in 1965, and a plan was made to transfer her from the hospital to a foster home. The plan depended, however, upon Mrs. Barley's obtaining welfare assistance for her support. Her application for assistance under the program for Aid to the Permanently and Totally Disabled was denied because her time spent in the hospital did not count in determining compliance with the one-year requirement.

Appellee Brown lived with her mother and two of her three children in Fort Smith, Arkansas. Her third child was living with appellee Brown's father in the District of Columbia. When her mother moved from Fort Smith to Oklahoma, appellee Brown, in February 1966, returned to the District of Columbia where she had lived as a child. Her application for AFDC assistance was approved insofar as it sought assistance for the child who had lived in the District with her father but was denied to the extent it sought assistance for the two other children.

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[3] D. C. Code Ann. § 3–203 (1967) provides:

"Public assistance shall be awarded to or on behalf of any needy individual who either (a) has resided in the District for one year immediately preceding the date of filing his application for such assistance; or (b) who was born within one year immediately preceding the application for such aid, if the parent or other relative with whom the child is living has resided in the District for one year immediately preceding the birth; or (c) is otherwise within one of the categories of public assistance established by this chapter." See D. C. Handbook of Pub. Assistance Policies and Procedures, HPA-2, EL 9.1, I, III (1966) (hereinafter cited as D. C. Handbook).

Appellee Legrant moved with her two children from South Carolina to the District of Columbia in March 1967 after the death of her mother. She planned to live with a sister and brother in Washington. She was pregnant and in ill health when she applied for and was denied AFDC assistance in July 1967.

The several cases were consolidated for trial, and a three-judge District Court was convened.[4] The court, one judge dissenting, held § 3–203 unconstitutional. 279 F. Supp. 22 (1967). The majority rested its decision on the ground that the one-year requirement was unconstitutional as a denial of the right to equal protection secured by the Due Process Clause of the Fifth Amendment. We noted probable jurisdiction. 390 U. S. 940 (1968).

In No. 34, there are two appellees, Smith and Foster, who were denied AFDC aid on the sole ground that they had not been residents of Pennsylvania for a year prior to their applications as required by § 432 (6) of the

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[4] In *Ex parte Cogdell,* 342 U. S. 163 (1951), this Court remanded to the Court of Appeals for the District of Columbia Circuit to determine whether 28 U. S. C. § 2282, requiring a three-judge court when the constitutionality of an Act of Congress is challenged, applied to Acts of Congress pertaining solely to the District of Columbia. The case was mooted below, and the question has never been expressly resolved. However, in *Berman* v. *Parker,* 348 U. S. 26 (1954), this Court heard an appeal from a three-judge court in a case involving the constitutionality of a District of Columbia statute. Moreover, three-judge district courts in the District of Columbia have continued to hear cases involving such statutes. See, *e. g., Hobson* v. *Hansen,* 265 F. Supp. 902 (1967). Section 2282 requires a three-judge court to hear a challenge to the constitutionality of *"any* Act of Congress." (Emphasis supplied.) We see no reason to make an exception for Acts of Congress pertaining to the District of Columbia.

Pennsylvania Welfare Code.[5] Appellee Smith and her five minor children moved in December 1966 from Delaware to Philadelphia, Pennsylvania, where her father lived. Her father supported her and her children for several months until he lost his job. Appellee then applied for AFDC assistance and had received two checks when the aid was terminated. Appellee Foster, after living in Pennsylvania from 1953 to 1965, had moved with her four children to South Carolina to care for her grandfather and invalid grandmother and had returned to Pennsylvania in 1967. A three-judge District Court for the Eastern District of Pennsylvania, one judge dissenting, declared § 432 (6) unconstitutional. 277 F. Supp. 65 (1967). The majority held that the classification established by the waiting-period requirement is "without rational basis and without legitimate purpose or function" and therefore a violation of the Equal Protection Clause. *Id.*, at 67. The majority noted further that if the purpose of the statute was "to erect a barrier against the movement of indigent persons into the State or to effect their prompt departure after they have gotten there," it would be "patently improper and its implementation plainly impermissible." *Id.*, at 67–68. We noted probable jurisdiction. 390 U. S. 940 (1968).

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[5] Pa. Stat., Tit. 62, § 432 (6) (1968). See also Pa. Pub. Assistance Manual §§ 3150–3151 (1962). Section 432 (6) provides:

"Assistance may be granted only to or in behalf of a person residing in Pennsylvania who (i) has resided therein for at least one year immediately preceding the date of application; (ii) last resided in a state which, by law, regulation or reciprocal agreement with Pennsylvania, grants public assistance to or in behalf of a person who has resided in such state for less than one year; (iii) is a married woman residing with a husband who meets the requirement prescribed in subclause (i) or (ii) of this clause; or (iv) is a child less than one year of age whose parent, or relative with whom he is residing, meets the requirement prescribed in subclause (i), (ii) or (iii) of this clause or resided in Pennsylvania for at least one year immediately preceding the child's birth. Needy persons who do not meet any of the requirements stated in this clause and who are transients or without residence in any state, may be granted assistance in accordance with rules, regulations, and standards established by the department."

II.

There is no dispute that the effect of the waiting-period requirement in each case is to create two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction. On the basis of this sole difference the first class is granted and the second class is denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life. In each case, the District Court found that appellees met the test for residence in their jurisdictions, as well as all other eligibility requirements except the requirement of residence for a full year prior to their applications. On reargument, appellees' central contention is that the statutory prohibition of benefits to residents of less than a year creates a classification which constitutes an invidious discrimination denying them equal protection of the laws.[6] We agree. The interests which appellants assert are promoted by the classification either may not constitutionally be promoted by government or are not compelling governmental interests.

III.

Primarily, appellants justify the waiting-period requirement as a protective device to preserve the fiscal integrity of state public assistance programs. It is asserted that people who require welfare assistance during their first year of residence in a State are likely to become continuing burdens on state welfare programs. Therefore, the argument runs, if such people can be deterred from entering the jurisdiction by denying them welfare benefits during the first year, state programs to assist long-time residents will not be impaired by a substantial influx of indigent newcomers.[7]

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[6] This constitutional challenge cannot be answered by the argument that public assistance benefits are a "privilege" and not a "right." See *Sherbert* v. *Verner,* 374 U. S. 398, 404 (1963).

There is weighty evidence that exclusion from the jurisdiction of the poor who need or may need relief was the specific objective of these provisions. In the Congress, sponsors of federal legislation to eliminate all residence requirements have been consistently opposed by representatives of state and local welfare agencies who have stressed the fears of the States that elimination of the requirements would result in a heavy influx of individuals into States providing the most generous benefits. See, *e. g.*, Hearings on H. R. 10032 before the House Committee on Ways and Means, 87th Cong., 2d Sess., 309–310, 644 (1962); Hearings on H. R. 6000 before the Senate Committee on Finance, 81st Cong.,

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[7] The waiting-period requirement has its antecedents in laws prevalent in England and the American Colonies centuries ago which permitted the ejection of individuals and families if local authorities thought they might become public charges. For example, the preamble of the English Law of Settlement and Removal of 1662 expressly recited the concern, also said to justify the three statutes before us, that large numbers of the poor were moving to parishes where more liberal relief policies were in effect. See generally Coll, Perspectives in Public Welfare: The English Heritage, 4 Welfare in Review, No. 3, p. 1 (1966). The 1662 law and the earlier Elizabethan Poor Law of 1601 were the models adopted by the American Colonies. Newcomers to a city, town, or county who might become public charges were "warned out" or "passed on" to the next locality. Initially, the funds for welfare payments were raised by local taxes, and the controversy as to responsibility for particular indigents was between localities in the same State. As States—first alone and then with federal grants—assumed the major responsibility, the contest of nonresponsibility became interstate.

2d Sess., 324–327 (1950). The sponsor of the Connecticut requirement said in its support: "I doubt that Connecticut can and should continue to allow unlimited migration into the state on the basis of offering instant money and permanent income to all who can make their way to the state regardless of their ability to contribute to the economy." H. B. 82, Connecticut General Assembly House Proceedings, February Special Session, 1965, Vol. II, pt. 7, p. 3504. In Pennsylvania, shortly after the enactment of the one-year requirement, the Attorney General issued an opinion construing the one-year requirement strictly because "[a]ny other conclusion would tend to attract the dependents of other states to our Commonwealth." 1937–1938 Official Opinions of the Attorney General, No. 240, p. 110. In the District of Columbia case, the constitutionality of § 3–203 was frankly defended in the District Court and in this Court on the ground that it is designed to protect the jurisdiction from an influx of persons seeking more generous public assistance than might be available elsewhere.

We do not doubt that the one-year waiting-period device is well suited to discourage the influx of poor families in need of assistance. An indigent who desires to migrate, resettle, find a new job, and start a new life will doubtless hesitate if he knows that he must risk making the move without the possibility of falling back on state welfare assistance during his first year of residence, when his need may be most acute. But the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible.

This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement. That proposition was early stated by Chief Justice Taney in the *Passenger Cases,* 7 How. 283, 492 (1849):

> "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision.[8] It suffices that, as MR. JUSTICE STEWART said for the Court in *United States* v. *Guest,* 383 U. S. 745, 757-758 (1966):

> "The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.
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> ". . . [T]he right finds no explicit mention in the Constitution. The reason, it has been suggested, is

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[8] In *Corfield* v. *Coryell,* 6 F. Cas. 546, 552 (No. 3230) (C. C. E. D. Pa. 1825), *Paul* v. *Virginia,* 8 Wall. 168, 180 (1869), and *Ward* v. *Maryland,* 12 Wall. 418, 430 (1871), the right to travel interstate was grounded upon the Privileges and Immunities Clause of Art. IV, § 2. See also *Slaughter-House Cases,* 16 Wall. 36, 79 (1873); *Twining* v. *New Jersey,* 211 U. S. 78, 97 (1908). In *Edwards* v. *California,* 314 U. S. 160, 181, 183-185 (1941) (DOUGLAS and Jackson, JJ., concurring), and *Twining* v. *New Jersey, supra,* reliance was placed on the Privileges and Immunities Clause of the Fourteenth Amendment. See also *Crandall* v. *Nevada,* 6 Wall. 35 (1868). In *Edwards* v. *California, supra,* and the *Passenger Cases,* 7 How. 283 (1849), a Commerce Clause approach was employed.

See also *Kent* v. *Dulles,* 357 U. S. 116, 125 (1958); *Aptheker* v. *Secretary of State,* 378 U. S. 500, 505-506 (1964); *Zemel* v. *Rusk,* 381 U. S. 1, 14 (1965), where the freedom of Americans to travel outside the country was grounded upon the Due Process Clause of the Fifth Amendment.

> that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution."

Thus, the purpose of deterring the in-migration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible. If a law has "no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional." *United States* v. *Jackson,* 390 U. S. 570, 581 (1968).

Alternatively, appellants argue that even if it is impermissible for a State to attempt to deter the entry of all indigents, the challenged classification may be justified as a permissible state attempt to discourage those indigents who would enter the State solely to obtain larger benefits. We observe first that none of the statutes before us is tailored to serve that objective. Rather, the class of barred newcomers is all-inclusive, lumping the great majority who come to the State for other purposes with those who come for the sole purpose of collecting higher benefits. In actual operation, therefore, the three statutes enact what in effect are nonrebuttable presumptions that every applicant for assistance in his first year of residence came to the jurisdiction solely to obtain higher benefits. Nothing whatever in any of these records supplies any basis in fact for such a presumption.

More fundamentally, a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally. Implicit in any such distinction is the notion that indigents who enter a State with the hope of securing higher welfare benefits are somehow less deserving than indigents who do not take this consideration into account. But we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among others factors, the level of a State's public assistance. Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its better educational facilities.

Appellants argue further that the challenged classification may be sustained as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes. We have difficulty seeing how long-term residents who qualify for welfare are making a greater present contribution to the State in taxes than indigent residents who have recently arrived. If the argument is based on contributions made in the past by the long-term residents, there is some question, as a factual matter, whether this argument is applicable in Pennsylvania where the record suggests that some 40% of those denied public assistance because of the waiting period had lengthy prior residence in the State.[9] But we need not rest on the particular facts of these cases. Appellants' reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services.[10]

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[9] Furthermore, the contribution rationale can hardly explain why the District of Columbia and Pennsylvania bar payments to children who have not lived in the jurisdiction for a year regardless of whether the parents have lived in the jurisdiction for that period. See D. C. Code § 3–203; D. C. Handbook, EL 9.1, I (C)(1966); Pa. Stat., Tit. 62, § 432 (6) (1968). Clearly, the children who were barred would not have made a contribution during that year.

We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification.[11]

In sum, neither deterrence of indigents from migrating to the State nor limitation of welfare benefits to those regarded as contributing to the State is a constitutionally permissible state objective.

IV.

Appellants next advance as justification certain administrative and related governmental objectives allegedly served by the waiting-period requirement.[12] They argue that the requirement (1) facilitates the planning of the welfare budget; (2) provides an objective test of residency; (3) minimizes the opportunity for recipients fraudulently to receive payments from more than one jurisdiction; and (4) encourages early entry of new residents into the labor force.

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[10] We are not dealing here with state insurance programs which may legitimately tie the amount of benefits to the individual's contributions.

[11] In *Rinaldi* v. *Yeager,* 384 U. S. 305 (1966), New Jersey attempted to reduce expenditures by requiring prisoners who took an unsuccessful appeal to reimburse the State out of their institutional earnings for the cost of furnishing a trial transcript. This Court held the New Jersey statute unconstitutional because it did not require similar repayments from unsuccessful appellants given a suspended sentence, placed on probation, or sentenced only to a fine. There was no rational basis for the distinction between unsuccessful appellants who were in prison and those who were not.

[12] Appellant in No. 9, the Connecticut Welfare Commissioner, disclaims any reliance on this contention. In No. 34, the District

At the outset, we reject appellants' argument that a mere showing of a rational relationship between the waiting period and these four admittedly permissible state objectives will suffice to justify the classification. See *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78 (1911); *Flemming* v. *Nestor,* 363 U. S. 603, 611 (1960); *McGowan* v. *Maryland,* 366 U. S. 420, 426 (1961). The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional. Cf. *Skinner* v. *Oklahoma,* 316 U. S. 535, 541 (1942); *Korematsu* v. *United States,* 323 U. S. 214, 216 (1944); *Bates* v. *Little Rock,* 361 U. S. 516, 524 (1960); *Sherbert* v. *Verner,* 374 U. S. 398, 406 (1963).

The argument that the waiting-period requirement facilitates budget predictability is wholly unfounded. The records in all three cases are utterly devoid of evidence that either State or the District of Columbia in fact uses the one-year requirement as a means to predict the number of people who will require assistance in the budget year. None of the appellants takes a census of new residents or collects any other data that would reveal the number of newcomers in the State less than a year.

Court found as a fact that the Pennsylvania requirement served none of the claimed functions. 277 F. Supp. 65, 68 (1967).

Nor are new residents required to give advance notice of their need for welfare assistance.[13] Thus, the welfare authorities cannot know how many new residents come into the jurisdiction in any year, much less how many of them will require public assistance. In these circumstances, there is simply no basis for the claim that the one-year waiting requirement serves the purpose of making the welfare budget more predictable. In Connecticut and Pennsylvania the irrelevance of the one-year requirement to budgetary planning is further underscored by the fact that temporary, partial assistance is given to some new residents [14] and full assistance is given to other new residents under reciprocal agreements.[15] Finally, the claim that a one-year waiting requirement is used for planning purposes is plainly belied by the fact that the requirement is not also imposed on applicants who are long-term residents, the group that receives the bulk of welfare payments. In short, the States rely on methods other than the one-year requirement to make budget estimates. In No. 34, the Director of the Pennsylvania Bureau of Assistance Policies and Standards testified that, based on experience in Pennsylvania and elsewhere, her office had already estimated how much the elimination of the one-year requirement would cost and that the estimates of costs of other changes in regulations "have proven exceptionally accurate."

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[13] Of course, such advance notice would inevitably be unreliable since some who registered would not need welfare a year later while others who did not register would need welfare.

[14] See Conn. Gen. Stat. Rev. § 17-2d, now § 17-2c, and Pa. Pub. Assistance Manual § 3154 (1968).

[15] Both Connecticut and Pennsylvania have entered into open-ended interstate compacts in which they have agreed to eliminate the durational requirement for anyone who comes from another State which has also entered into the compact. Conn. Gen. Stat. Rev. § 17-21a (1968); Pa. Pub. Assistance Manual § 3150, App. I (1966).

The argument that the waiting period serves as an administratively efficient rule of thumb for determining residency similarly will not withstand scrutiny. The residence requirement and the one-year waiting-period requirement are distinct and independent prerequisites for assistance under these three statutes, and the facts relevant to the determination of each are directly examined by the welfare authorities.[16] Before granting an application, the welfare authorities investigate the applicant's employment, housing, and family situation and in the course of the inquiry necessarily learn the facts upon which to determine whether the applicant is a resident.[17]

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[16] In Pennsylvania, the one-year waiting-period requirement, but not the residency requirement, is waived under reciprocal agreements. Pa. Stat., Tit. 62, § 432 (6) (1968); Pa. Pub. Assistance Manual § 3151.21 (1962).

1 Conn. Welfare Manual, c. II, § 220 (1966), provides that "[r]esidence within the state shall mean that the applicant is living in an established place of abode and the plan is to remain." A person who meets this requirement does not have to wait a year for assistance if he entered the State with a bona fide job offer or with sufficient funds to support himself without welfare for three months. *Id.*, at § 219.2.

HEW Handbook of Pub. Assistance Administration, pt. IV, § 3650 (1946), clearly distinguishes between residence and duration of residence. It defines residence, as is conventional, in terms of intent to remain in the jurisdiction, and it instructs interviewers that residence and length of residence "are two distinct aspects . . . ."

[17] See, *e. g.*, D. C. Handbook, chapters on Eligibility Payments, Requirements, Resources, and Reinvestigation for an indication of how thorough these investigations are. See also 1 Conn. Welfare Manual, c. I (1967); Pa. Pub. Assistance Manual §§ 3170–3330 (1962).

The Department of Health, Education, and Welfare has proposed the elimination of individual investigations, except for spot checks, and the substitution of a declaration system, under which the "agency accepts the statements of the applicant for or recipient of assistance, about facts that are within his knowledge and competence . . . as a basis for decisions regarding his eligibility and extent of entitlement." HEW, Determination of Eligibility for Public

Similarly, there is no need for a State to use the one-year waiting period as a safeguard against fraudulent receipt of benefits;[18] for less drastic means are available, and are employed, to minimize that hazard. Of course, a State has a valid interest in preventing fraud by any applicant, whether a newcomer or a long-time resident. It is not denied, however, that the investigations now conducted entail inquiries into facts relevant to that subject. In addition, cooperation among state welfare departments is common. The District of Columbia, for example, provides interim assistance to its former residents who have moved to a State which has a waiting period. As a matter of course, District officials send a letter to the welfare authorities in the recipient's new community "to request the information needed to continue assistance."[19] A like procedure would be an effective safeguard against the hazard of double payments. Since double payments can be prevented by a letter or a telephone call, it is unreasonable to accomplish this objective by the blunderbuss method of denying assistance to all indigent newcomers for an entire year.

Pennsylvania suggests that the one-year waiting period is justified as a means of encouraging new residents to join the labor force promptly. But this logic would also require a similar waiting period for long-term residents of the State. A state purpose to encourage employment

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Assistance Programs, 33 Fed. Reg. 17189 (1968). See also Hoshino, Simplification of the Means Test and its Consequences, 41 Soc. Serv. Rev. 237, 241–249 (1967); Burns, What's Wrong With Public Welfare?, 36 Soc. Serv. Rev. 111, 114–115 (1962). Presumably the statement of an applicant that he intends to remain in the jurisdiction would be accepted under a declaration system.

[18] The unconcern of Connecticut and Pennsylvania with the one-year requirement as a means of preventing fraud is made apparent by the waiver of the requirement in reciprocal agreements with other States. See n. 15, *supra*.

[19] D. C. Handbook, RV 2.1, I, II (B) (1967). See also Pa. Pub. Assistance Manual § 3153 (1962).

provides no rational basis for imposing a one-year waiting-period restriction on new residents only.

We conclude therefore that appellants in these cases do not use and have no need to use the one-year requirement for the governmental purposes suggested. Thus, even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional.[20] But, of course, the traditional criteria do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest. Under this standard, the waiting-period requirement clearly violates the Equal Protection Clause.[21]

V.

Connecticut and Pennsylvania argue, however, that the constitutional challenge to the waiting-period requirements must fail because Congress expressly approved the imposition of the requirement by the States as part of the jointly funded AFDC program.

Section 402 (b) of the Social Security Act of 1935, as amended, 42 U. S. C. § 602 (b), provides that:

> "The Secretary shall approve any [state assistance] plan which fulfills the conditions specified in sub-

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[20] Under the traditional standard, equal protection is denied only if the classification is "without any reasonable basis," *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78 (1911); see also *Flemming* v. *Nestor,* 363 U. S. 603 (1960).

[21] We imply no view of the validity of waiting-period *or* residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.

> section (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth."

On its face, the statute does not approve, much less prescribe, a one-year requirement. It merely directs the Secretary of Health, Education, and Welfare not to disapprove plans submitted by the States because they include such a requirement.[22] The suggestion that Congress enacted that directive to encourage state participation in the AFDC program is completely refuted by the legislative history of the section. That history discloses that Congress enacted the directive to curb hardships resulting from lengthy residence requirements. Rather than constituting an approval or a prescription of the requirement in state plans, the directive was the means chosen by Congress to deny federal funding to any State which persisted in stipulating excessive residence requirements as a condition of the payment of benefits.

One year before the Social Security Act was passed, 20 of the 45 States which had aid to dependent children programs required residence in the State for two or more years. Nine other States required two or more years of residence in a particular town or county. And 33 jurisdictions required at least one year of residence in a particular town or county.[23] Congress determined to combat this restrictionist policy. Both the House and Senate Committee Reports expressly stated that the objective of § 402 (b) was to compel "[l]iberality of residence requirement."[24] Not a single instance can be found in the debates or committee reports supporting the contention that § 402 (b) was enacted to encourage participation by the States in the AFDC program. To the contrary, those few who addressed themselves to waiting-period requirements emphasized that participation would depend on a State's repeal or drastic revision of existing requirements. A congressional demand on 41 States to repeal or drastically revise offending statutes is hardly a way to enlist their cooperation.[25]

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[22] As of 1964, 11 jurisdictions imposed no residence requirement whatever for AFDC assistance. They were Alaska, Georgia, Hawaii, Kentucky, New Jersey, New York, Rhode Island, Vermont, Guam, Puerto Rico, and the Virgin Islands. See HEW, Characteristics of State Public Assistance Plans under the Social Security Act (Pub. Assistance Rep. No. 50, 1964 ed.).

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[23] Social Security Board, Social Security in America 235–236 (1937).

[24] H. R. Rep. No. 615, 74th Cong., 1st Sess., 24; S. Rep. No. 628, 74th Cong., 1st Sess., 35. Furthermore, the House Report cited President Roosevelt's statement in his Social Security Message that "People want decent homes to live in; they want to locate them where they can engage in productive work . . . ." H. R. Rep., *supra,* at 2. Clearly this was a call for greater freedom of movement.

In addition to the statement in the above Committee report, see the remarks of Rep. Doughton (floor manager of the Social Security bill in the House) and Rep. Vinson. 79 Cong. Rec. 5474, 5602–5603 (1935). These remarks were made in relation to the waiting-period requirements for old-age assistance, but they apply equally to the AFDC program.

[25] Section 402 (b) required the repeal of 30 state statutes which imposed too long a waiting period in the State or particular town or county and 11 state statutes (as well as the Hawaii statute) which required residence in a particular town or county. See Social Security Board, Social Security in America 235–236 (1937).

It is apparent that Congress was not intimating any view of the constitutionality of a one-year limitation. The constitutionality of any scheme of federal social security legislation was a matter of

But even if we were to assume, *arguendo,* that Congress did approve the imposition of a one-year waiting period, it is the responsive *state* legislation which infringes constitutional rights. By itself § 402 (b) has absolutely no restrictive effect. It is therefore not that statute but only the state requirements which pose the constitutional question.

Finally, even if it could be argued that the constitutionality of § 402 (b) is somehow at issue here, it follows from what we have said that the provision, insofar as it permits the one-year waiting-period requirement, would be unconstitutional. Congress may not authorize the States to violate the Equal Protection Clause. Perhaps Congress could induce wider state participation in school construction if it authorized the use of joint funds for the building of segregated schools. But could it seriously be contended that Congress would be constitutionally justified in such authorization by the need to secure state cooperation? Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause. *Katzenbach* v. *Morgan,* 384 U. S. 641, 651, n. 10 (1966).

VI.

The waiting-period requirement in the District of Columbia Code involved in No. 33 is also unconstitutional even though it was adopted by Congress as an exercise of federal power. In terms of federal power, the discrimination created by the one-year requirement violates the Due

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doubt at that time in light of the decision in *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495 (1935). Throughout the House debates congressmen discussed the constitutionality of the fundamental taxing provisions of the Social Security Act, see, *e. g.,* 79 Cong. Rec. 5783 (1935) (remarks of Rep. Cooper), but not once did they discuss the constitutionality of § 402 (b).

Process Clause of the Fifth Amendment. "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider* v. *Rusk,* 377 U. S. 163, 168 (1964); *Bolling* v. *Sharpe,* 347 U. S. 497 (1954). For the reasons we have stated in invalidating the Pennsylvania and Connecticut provisions, the District of Columbia provision is also invalid—the Due Process Clause of the Fifth Amendment prohibits Congress from denying public assistance to poor persons otherwise eligible solely on the ground that they have not been residents of the District of Columbia for one year at the time their applications are filed.

Accordingly, the judgments in Nos. 9, 33, and 34 are

Affirmed.

MR. JUSTICE STEWART, concurring.

In joining the opinion of the Court, I add a word in response to the dissent of my Brother HARLAN, who, I think, has quite misapprehended what the Court's opinion says.

The Court today does *not* "pick out particular human activities, characterize them as 'fundamental,' and give them added protection . . . ." To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands.

"The constitutional right to travel from one State to another . . . has been firmly established and repeatedly recognized." *United States* v. *Guest,* 383 U. S. 745, 757. This constitutional right, which, of course, includes the right of "entering and abiding in any State in the Union," *Truax* v. *Raich,* 239 U. S. 33, 39, is *not* a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards.[1] "[T]he right to travel freely from State to State finds constitutional protection that is quite independent of the Fourteenth Amendment." *United States* v. *Guest, supra,* at 760, n. 17.[2] As we made clear in *Guest,* it is a right broadly assertable against private interference as well as governmental action.[3] Like the right of association, *NAACP* v. *Alabama,* 357 U. S. 449, it is a virtually unconditional personal right,[4] guaranteed by the Constitution to us all.

It follows, as the Court says, that "the purpose of deterring the in-migration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible." And it further follows, as the Court says, that any *other* purposes offered in support of a law that so clearly impinges upon the constitutional right of interstate travel must be shown to reflect a *compelling* governmental interest. This is necessarily true whether the impinging law be a classification statute to be tested against the Equal Protection Clause, or a state or federal regulatory law, to be tested against the Due Process Clause of the Fourteenth or Fifth Amendment. As MR. JUSTICE HARLAN wrote for the Court more than a decade ago, "[T]o justify the deterrent effect . . . on the free exercise . . . of their constitutionally protected right . . . a '. . . subordinating interest of the State must be compelling.' " *NAACP* v. *Alabama, supra,* at 463.

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[1] By contrast, the "right" of international travel has been considered to be no more than an aspect of the "liberty" protected by the Due Process Clause of the Fifth Amendment. *Kent* v. *Dulles,* 357 U. S. 116, 125; *Aptheker* v. *Secretary of State,* 378 U. S. 500, 505-506. As such, this "right," the Court has held, can be regulated within the bounds of due process. *Zemel* v. *Rusk,* 381 U. S. 1.

[2] The constitutional right of interstate travel was fully recognized long before adoption of the Fourteenth Amendment. See the statement of Chief Justice Taney in the *Passenger Cases,* 7 How. 283, 492:

"For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

[3] MR. JUSTICE HARLAN was alone in dissenting from this square holding in *Guest. Supra,* at 762.

[4] The extent of emergency governmental power temporarily to prevent or control interstate travel, *e. g.,* to a disaster area, need not be considered in these cases.

The Court today, therefore, is not "contriving new constitutional principles." It is deciding these cases under the aegis of established constitutional law.[5]

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE BLACK joins, dissenting.

In my opinion the issue before us can be simply stated: May Congress, acting under one of its enumerated powers, impose minimal nationwide residence requirements or authorize the States to do so? Since I believe that Congress does have this power and has constitutionally exercised it in these cases, I must dissent.

I.

The Court insists that § 402 (b) of the Social Security Act "does not approve, much less prescribe, a one-year requirement." *Ante,* at 639. From its reading of the legislative history it concludes that Congress did not intend to authorize the States to impose residence requirements. An examination of the relevant legislative materials compels, in my view, the opposite conclusion, *i. e.,* Congress intended to authorize state residence requirements of up to one year.

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[5] It is to be remembered that the Court today *affirms* the judgments of three different federal district courts, and that at least four other federal courts have reached the same result. See *ante,* at 622, n. 1.

The Great Depression of the 1930's exposed the inadequacies of state and local welfare programs and dramatized the need for federal participation in welfare assistance. See J. Brown, Public Relief 1929–1939 (1940). Congress determined that the Social Security Act, containing a system of unemployment and old-age insurance as well as the categorical assistance programs now at issue, was to be a major step designed to ameliorate the problems of economic insecurity. The primary purpose of the categorical assistance programs was to encourage the States to provide new and greatly enhanced welfare programs. See, *e. g.,* S. Rep. No. 628, 74th Cong., 1st Sess., 5–6, 18–19 (1935); H. R. Rep. No. 615, 74th Cong., 1st Sess., 4 (1935). Federal aid would mean an immediate increase in the amount of benefits paid under state programs. But federal aid was to be conditioned upon certain requirements so that the States would remain the basic administrative units of the welfare system and would be unable to shift the welfare burden to local governmental units with inadequate financial resources. See Advisory Commission on Intergovernmental Relations, Statutory and Administrative Controls Associated with Federal Grants for Public Assistance 9–26 (1964). Significantly, the categories of assistance programs created by the Social Security Act corresponded to those already in existence in a number of States. See J. Brown, Public Relief 1929–1939, at 26–32. Federal entry into the welfare area can therefore be best described as a major experiment in "cooperative federalism," *King* v. *Smith,* 392 U. S. 309, 317 (1968), combining state and federal participation to solve the problems of the depression.

Each of the categorical assistance programs contained in the Social Security Act allowed participating States to impose residence requirements as a condition of eligibility for benefits. Congress also imposed a one-year requirement for the categorical assistance programs operative in the District of Columbia. See H. R. Rep. No. 891, 74th Cong., 1st Sess. (1935) (old-age pensions); H. R. Rep. No. 201, 74th Cong., 1st Sess. (1935) (aid to the blind). The congressional decision to allow the States to impose residence requirements and to enact such a requirement for the District was the subject of considerable discussion. Both those favoring lengthy residence requirements[1] and those opposing all requirements[2] pleaded their case during the congressional hearings on the Social Security Act. Faced with the competing claims of States which feared that abolition of residence requirements would result in an influx of persons seeking higher welfare payments and of organizations which stressed the unfairness of such requirements to transient workers forced by the economic dislocation of the depression to seek work far from their homes, Congress chose a middle course. It required those States seeking federal grants for categorical assistance to reduce their existing residence requirements to what Congress viewed as an acceptable maximum. However, Congress accommodated state fears by allowing the States to retain minimal residence requirements.

Congress quickly saw evidence that the system of welfare assistance contained in the Social Security Act including residence requirements was operating to encourage States to expand and improve their categorical assistance programs. For example, the Senate was told in 1939:

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[1] See, *e. g.*, Hearings on H. R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess., 831–832, 861–871 (1935).

[2] See, *e. g.*, Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., 522–540, 643, 656 (1935).

> "The rapid expansion of the program for aid to dependent children in the country as a whole since 1935 stands in marked contrast to the relatively stable picture of mothers' aid in the preceding 4-year period from 1932 through 1935. The extension of the program during the last 3 years is due to Federal contributions which encouraged the matching of State and local funds." S. Rep. No. 734, 76th Cong., 1st Sess., 29 (1939).

The trend observed in 1939 continued as the States responded to the federal stimulus for improvement in the scope and amount of categorical assistance programs. See Wedemeyer & Moore, The American Welfare System, 54 Calif. L. Rev. 326, 347–356 (1966). Residence requirements have remained a part of this combined state-federal welfare program for 34 years. Congress has adhered to its original decision that residence requirements were necessary in the face of repeated attacks against these requirements.[3] The decision to retain residence requirements, combined with Congress' continuing desire to encourage wider state participation in categorical assistance programs, indicates to me that Congress has authorized the imposition by the States of residence requirements.

II.

Congress has imposed a residence requirement in the District of Columbia and authorized the States to impose similar requirements. The issue before us must therefore be framed in terms of whether Congress may create minimal residence requirements, not whether the States, acting alone, may do so. See *Prudential Insurance Co.* v. *Benjamin,* 328 U. S. 408 (1946); *In re Rahrer,* 140 U. S. 545 (1891). Appellees insist that a congressionally mandated residence requirement would violate their right to travel. The import of their contention is that Congress, even under its "plenary"[4] power to control interstate commerce, is constitutionally prohibited from imposing residence requirements. I reach a contrary conclusion for I am convinced that the extent of the burden on interstate travel when compared with the justification for its imposition requires the Court to uphold this exertion of federal power.

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[3] See *e. g.*, Hearings on H. R. 10032 before the House Committee on Ways and Means, 87th Cong., 2d Sess., 355, 385–405, 437 (1962); Hearings on H. R. 6000 before the Senate Committee on Finance, 81st Cong., 2d Sess., 142–143 (1950).

Congress, pursuant to its commerce power, has enacted a variety of restrictions upon interstate travel. It has taxed air and rail fares and the gasoline needed to power cars and trucks which move interstate. 26 U. S. C. § 4261 (air fares); 26 U. S. C. § 3469 (1952 ed.), repealed in part by Pub. L. 87-508, § 5 (b), 76 Stat. 115 (rail fares); 26 U. S. C. § 4081 (gasoline). Many of the federal safety regulations of common carriers which cross state lines burden the right to travel. 45 U. S. C. §§ 1-43 (railroad safety appliances); 49 U. S. C. § 1421 (air safety regulations). And Congress has prohibited by criminal statute interstate travel for certain purposes. *E. g.,* 18 U. S. C. § 1952. Although these restrictions operate as a limitation upon free interstate movement of persons, their constitutionality appears well settled. See *Texas & Pacific R. Co.* v. *Rigsby,* 241 U. S. 33, 41 (1916); *Southern R. Co.* v. *United States,* 222 U. S. 20 (1911); *United States* v. *Zizzo,* 338 F. 2d 577 (C. A. 7th Cir., 1964), cert. denied, 381 U. S. 915 (1965). As the Court observed in *Zemel* v. *Rusk,* 381 U. S. 1, 14 (1965), "the fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited."

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[4] See *e. g., Heart of Atlanta Motel, Inc.* v. *United States,* 379 U. S. 241, 256-260 (1964).

The Court's right-to-travel cases lend little support to the view that congressional action is invalid merely because it burdens the right to travel. Most of our cases fall into two categories: those in which *state*-imposed restrictions were involved, see, *e. g., Edwards* v. *California,* 314 U. S. 160 (1941); *Crandall* v. *Nevada,* 6 Wall. 35 (1868), and those concerning congressional decisions to remove impediments to interstate movement, see, *e. g., United States* v. *Guest,* 383 U. S. 745 (1966). Since the focus of our inquiry must be whether Congress would exceed permissible bounds by imposing residence requirements, neither group of cases offers controlling principles.

In only three cases have we been confronted with an assertion that Congress has impermissibly burdened the right to travel. *Kent* v. *Dulles,* 357 U. S. 116 (1958), did invalidate a burden on the right to travel; however, the restriction was voided on the nonconstitutional basis that Congress did not intend to give the Secretary of State power to create the restriction at issue. *Zemel* v. *Rusk, supra,* on the other hand, sustained a flat prohibition of travel to certain designated areas and rejected an attack that Congress could not constitutionally impose this restriction. *Aptheker* v. *Secretary of State,* 378 U. S. 500 (1964), is the only case in which this Court invalidated on a constitutional basis a congressionally imposed restriction. *Aptheker* also involved a flat prohibition but in combination with a claim that the congressional restriction compelled a potential traveler to choose between his right to travel and his First Amendment right of freedom of association. It was this Hobson's choice, we later explained, which forms the rationale of *Aptheker.* See *Zemel* v. *Rusk, supra,* at 16. *Aptheker* thus contains two characteristics distinguishing it from the appeals now before the Court: a combined infringement of two constitutionally protected rights and a flat prohibition upon travel. Residence requirements do not create a flat prohibition, for potential welfare recipients may move from State to State and establish residence wherever they please. Nor is any claim made by appellees that residence requirements compel them to choose between the right to travel and another constitutional right.

Zemel v. *Rusk,* the most recent of the three cases, provides a framework for analysis. The core inquiry is "the extent of the governmental restriction imposed" and the "extent of the necessity for the restriction." *Id.,* at 14. As already noted, travel itself is not prohibited. Any burden inheres solely in the fact that a potential welfare recipient might take into consideration the loss of welfare benefits for a limited period of time if he changes his residence. Not only is this burden of uncertain degree,[5] but appellees themselves assert there is evidence that few welfare recipients have in fact been deterred by residence requirements. See Harvith, The Constitutionality of Residence Tests for General and Categorical Assistance Programs, 54 Calif. L. Rev. 567, 615–618 (1966); Note, Residence Requirements in State Public Welfare Statutes, 51 Iowa L. Rev. 1080, 1083–1085 (1966).

The insubstantiality of the restriction imposed by residence requirements must then be evaluated in light of the possible congressional reasons for such requirements. See, *e. g., McGowan* v. *Maryland,* 366 U. S. 420, 425–427 (1961). One fact which does emerge with clarity from the legislative history is Congress' belief that a program of cooperative federalism combining federal aid with enhanced state participation would result in an increase in the scope of welfare programs and level of benefits. Given the apprehensions of many States that an increase in benefits without minimal residence requirements would result in an inability to provide an adequate welfare system, Congress deliberately adopted the intermediate course of a cooperative program. Such a program, Congress believed, would encourage the States to assume greater welfare responsibilities and would give the States the necessary financial support for such an undertaking. Our cases require only that Congress have a rational basis for finding that a chosen regulatory scheme is necessary to the furtherance of interstate commerce. See, *e. g.*, *Katzenbach* v. *McClung,* 379 U. S. 294 (1964); *Wickard* v. *Filburn,* 317 U. S. 111 (1942). Certainly, a congressional finding that residence requirements allowed each State to concentrate its resources upon new and increased programs of rehabilitation ultimately resulting in an enhanced flow of commerce as the economic condition of welfare recipients progressively improved is rational and would justify imposition of residence requirements under the Commerce Clause. And Congress could have also determined that residence requirements fostered personal mobility. An individual no longer dependent upon welfare would be presented with an unfettered range of choices so that a decision to migrate could be made without regard to considerations of possible economic dislocation.

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[5] The burden is uncertain because indigents who are disqualified from categorical assistance by residence requirements are not left wholly without assistance. All of the appellees in these cases found alternative sources of assistance after their disqualification.

Appellees suggest, however, that Congress was not motivated by rational considerations. Residence requirements are imposed, they insist, for the illegitimate purpose of keeping poor people from migrating. Not only does the legislative history point to an opposite conclusion, but it also must be noted that "[i]nto the motives which induced members of Congress to [act] . . . this Court may not enquire." *Arizona* v. *California,* 283 U. S. 423, 455 (1931). We do not attribute an impermissible purpose to Congress if the result would be to strike down an otherwise valid statute. *United States* v. *O'Brien,* 391 U. S. 367, 383 (1968); *McCray* v. *United States,* 195 U. S. 27, 56 (1904). Since the congressional decision is rational and the restriction on travel insubstantial, I conclude that residence requirements can be imposed by Congress as an exercise of its power to control interstate commerce consistent with the constitutionally guaranteed right to travel.

Without an attempt to determine whether any of Congress' enumerated powers would sustain residence requirements, the Court holds that congressionally imposed requirements violate the Due Process Clause of the Fifth Amendment. It thus suggests that, even if residence requirements would be a permissible exercise of the commerce power, they are "so unjustifiable as to be violative of due process." *Ante,* at 642. While the reasons for this conclusion are not fully explained, the Court apparently believes that, in the words of *Bolling* v. *Sharpe,* 347 U. S. 497, 500 (1954), residence requirements constitute "an arbitrary deprivation" of liberty.

If this is the import of the Court's opinion, then it seems to have departed from our precedents. We have long held that there is no requirement of uniformity when Congress acts pursuant to its commerce power. *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 401 (1940); *Currin* v. *Wallace,* 306 U. S. 1, 13–14 (1939).[6] I do not suggest that Congress is completely free when legislating under one of its enumerated powers to enact wholly arbitrary classifications, for *Bolling* v. *Sharpe, supra,* and *Schneider* v. *Rusk,* 377 U. S. 163 (1964), counsel otherwise. Neither of these cases, however, is authority for invalidation of congressionally imposed residence requirements. The classification in *Bolling* required racial segregation in the public schools of the District of Columbia and was thus based upon criteria which we subject to the most rigid scrutiny. *Loving* v. *Virginia,* 388 U. S. 1, 11 (1967). *Schneider* involved an attempt to distinguish between native-born and naturalized citizens solely for administrative convenience. By authorizing residence requirements Congress acted not to facilitate an administrative function but to further its conviction that an impediment to the commercial life of this Nation would be removed by a program of cooperative federalism combining federal contributions with enhanced state benefits. Congress, not the courts, is charged with determining the proper prescription for a national illness. I cannot say that Congress is powerless to decide that residence requirements would promote this permissible goal and therefore must conclude that such requirements cannot be termed arbitrary.

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[6] Some of the cases go so far as to intimate that at least in the area of taxation Congress is not inhibited by any problems of classification. See *Helvering* v. *Lerner Stores Corp.,* 314 U. S. 463, 468 (1941); *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 584 (1937); *LaBelle Iron Works* v. *United States,* 256 U. S. 377, 392 (1921).

The Court, after interpreting the legislative history in such a manner that the constitutionality of § 402 (b) is not at issue, gratuitously adds that § 402 (b) is unconstitutional. This method of approaching constitutional questions is sharply in contrast with the Court's approach in *Street* v. *New York, ante,* at 585–590. While in *Street* the Court strains to avoid the crucial constitutional question, here it summarily treats the constitutionality of a major provision of the Social Security Act when, given the Court's interpretation of the legislative materials, that provision is not at issue. Assuming that the constitutionality of § 402 (b) is properly treated by the Court, the cryptic footnote in *Katzenbach* v. *Morgan,* 384 U. S. 641, 651–652, n. 10 (1966), does not support its conclusion. Footnote 10 indicates that Congress is without power to undercut the equal-protection guarantee of racial equality in the guise of implementing the Fourteenth Amendment. I do not mean to suggest otherwise. However, I do not understand this footnote to operate as a limitation upon Congress' power to further the flow of interstate commerce by reasonable residence requirements. Although the Court dismisses § 402 (b) with the remark that Congress cannot authorize the States to violate equal protection, I believe that the dispositive issue is whether under its commerce power Congress can impose residence requirements.

Nor can I understand the Court's implication, *ante*, at 638, n. 21, that other state residence requirements such as those employed in determining eligibility to vote do not present constitutional questions. Despite the fact that in *Drueding* v. *Devlin*, 380 U. S. 125 (1965), we affirmed an appeal from a three-judge District Court after the District Court had rejected a constitutional challenge to Maryland's one-year residence requirement for presidential elections, the rationale employed by the Court in these appeals would seem to require the opposite conclusion. If a State would violate equal protection by denying welfare benefits to those who have recently moved interstate, then it would appear to follow that equal protection would also be denied by depriving those who have recently moved interstate of the fundamental right to vote. There is nothing in the opinion of the Court to explain this dichotomy. In any event, since the constitutionality of a state residence requirement as applied to a presidential election is raised in a case now pending, *Hall* v. *Beals*, No. 950, 1968 Term, I would await that case for a resolution of the validity of state voting residence requirements.

III.

The era is long past when this Court under the rubric of due process has reviewed the wisdom of a congressional decision that interstate commerce will be fostered by the enactment of certain regulations. Compare *Adkins* v. *Children's Hospital,* 261 U. S. 525 (1923), with *United States* v. *Darby,* 312 U. S. 100 (1941). Speaking for the Court in *Helvering* v. *Davis,* 301 U. S. 619, 644 (1937), Mr. Justice Cardozo said of another section of the Social Security Act:

> "Whether wisdom or unwisdom resides in the scheme of benefits set forth . . . is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom."

I am convinced that Congress does have power to enact residence requirements of reasonable duration or to authorize the States to do so and that it has exercised this power.

The Court's decision reveals only the top of the iceberg. Lurking beneath are the multitude of situations in which States have imposed residence requirements including eligibility to vote, to engage in certain professions or occupations or to attend a state-supported university. Although the Court takes pains to avoid acknowledging the ramifications of its decision, its implications cannot be ignored. I dissent.

MR. JUSTICE HARLAN, dissenting.

The Court today holds unconstitutional Connecticut, Pennsylvania, and District of Columbia statutes which restrict certain kinds of welfare benefits to persons who have lived within the jurisdiction for at least one year immediately preceding their applications. The Court has accomplished this result by an expansion of the comparatively new constitutional doctrine that some state statutes will be deemed to deny equal protection of the laws unless justified by a "compelling" governmental interest, and by holding that the Fifth Amendment's Due Process Clause imposes a similar limitation on federal enactments. Having decided that the "compelling interest" principle is applicable, the Court then finds that the governmental interests here asserted are either wholly impermissible or are not "compelling." For reasons which follow, I disagree both with the Court's result and with its reasoning.

I.

These three cases present two separate but related questions for decision. The first, arising from the District of Columbia appeal, is whether Congress may condition the right to receive Aid to Families with Dependent Children (AFDC) and Aid to the Permanently and Totally Disabled in the District of Columbia upon the recipient's having resided in the District for the preceding year.[1] The second, presented in the Pennsylvania and Connecticut appeals, is whether a State may, with the approval of Congress, impose the same conditions with respect to eligibility for AFDC assistance.[2] In each instance, the welfare residence requirements are alleged to be unconstitutional on two grounds: *first,* because they impose an undue burden upon the constitutional right of welfare applicants to travel interstate; *second,* because they deny to persons who have recently moved interstate and would otherwise be eligible for welfare assistance the equal protection of the laws assured by the Fourteenth Amendment (in the state cases) or the analogous protection afforded by the Fifth Amendment (in the District of Columbia case). Since the Court basically relies upon the equal protection ground, I shall discuss it first.

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[1] Of the District of Columbia appellees, all sought AFDC assistance except appellee Barley, who asked for Aid to the Permanently and Totally Disabled. In 42 U. S. C. § 602 (b), Congress has authorized "States" (including the District of Columbia, see 42 U. S. C. § 1301 (a)(1)) to require up to one year's immediately prior residence as a condition of eligibility for AFDC assistance. See n. 15, *infra*. In 42 U. S. C. §§ 1352 (b)(1) and 1382 (b)(2), Congress has permitted "States" to condition disability payments upon the applicant's having resided in the State for up to five of the preceding nine years. However, D. C. Code § 3–203 prescribes a one-year residence requirement for both types of assistance, so the question of the constitutionality of a longer required residence period is not before us.

Appellee Barley also challenged in the District Court the constitutionality of a District of Columbia regulation which provided that time spent in a District of Columbia institution as a public charge did not count as residence for purposes of welfare eligibility. The District Court held that the regulation must fall for the same reasons as the residence statute itself. Since I believe that the District Court erred in striking down the statute, and since the issue of the regulation's constitutionality has been argued in this Court only in passing, I would remand appellee Barley's cause for further consideration of that question.

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[2] I do not believe that the Pennsylvania appeal presents the additional question of the validity of a residence condition for a purely state-financed and state-authorized public assistance program. The Pennsylvania welfare eligibility provision, Pa. Stat. Ann., Tit. 62, § 432 (1968), states:

"Except as hereinafter otherwise provided . . . , needy persons of the classes defined in clauses (1) and (2) of this section shall be eligible for assistance:

"(1) Persons for whose assistance Federal financial participation is available to the Commonwealth as . . . aid to families with dependent children, . . . and which assistance is not precluded by other provisions of law.

"(2) Other persons who are citizens of the United States . . . .

* * * * *

"(6) Assistance may be granted only to or in behalf of a person residing in Pennsylvania who (i) has resided therein for at least one year immediately preceding the date of application . . . ."

As I understand it, this statute initially divides Pennsylvania welfare applicants into two classes: (1) persons for whom federal financial assistance is available and not precluded by other provisions of federal law (if state law, including the residence requirement, were intended, the "Except as hereinafter otherwise provided" proviso at the beginning of the entire section would be surplusage); (2) other persons who are citizens. The residence requirement applies to both classes. However, since all of the Pennsylvania appellees clearly fall into the first or federally assisted class, there is no need to consider whether residence conditions may constitutionally be imposed with respect to the second or purely state-assisted class.

II.

In upholding the equal protection argument,[3] the Court has applied an equal protection doctrine of relatively recent vintage: the rule that statutory classifications which either are based upon certain "suspect" criteria or affect "fundamental rights" will be held to deny equal protection unless justified by a "compelling" governmental interest. See *ante,* at 627, 634, 638.

The "compelling interest" doctrine, which today is articulated more explicitly than ever before, constitutes an increasingly significant exception to the long-established rule that a statute does not deny equal protection if it is rationally related to a legitimate governmental objective.[4] The "compelling interest" doctrine has two branches. The branch which requires that classifications based upon "suspect" criteria be supported by a compelling interest apparently had its genesis in cases involving racial classifications, which have, at least since *Korematsu* v. *United States,* 323 U. S. 214, 216 (1944), been regarded as inherently "suspect."[5] The criterion of "wealth" apparently was added to the list of "suspects" as an alternative justification for the rationale in *Harper*

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[3] In characterizing this argument as one based on an alleged denial of equal protection of the laws, I do not mean to disregard the fact that this contention is applicable in the District of Columbia only through the terms of the Due Process Clause of the Fifth Amendment. Nor do I mean to suggest that these two constitutional phrases are "always interchangeable," see *Bolling* v. *Sharpe,* 347 U. S. 497, 499 (1954). In the circumstances of this case, I do not believe myself obliged to explore whether there may be any differences in the scope of the protection afforded by the two provisions.

[4] See, *e. g., Rapid Transit Corp.* v. *City of New York,* 303 U. S. 573, 578 (1938). See also *infra,* at 662.

[5] See *Loving* v. *Virginia,* 388 U. S. 1, 11 (1967); cf. *Bolling* v. *Sharpe,* 347 U. S. 497, 499 (1954). See also *Hirabayashi* v. *United States,* 320 U. S. 81, 100 (1943); *Yick Wo* v. *Hopkins,* 118 U. S. U. S. 356 (1886).

v. *Virginia Bd. of Elections,* 383 U. S. 663, 668 (1966), in which Virginia's poll tax was struck down. The criterion of political allegiance may have been added in *Williams* v. *Rhodes,* 393 U. S. 23 (1968).[6] Today the list apparently has been further enlarged to include classifications based upon recent interstate movement, and perhaps those based upon the exercise of *any* constitutional right, for the Court states, *ante,* at 634:

> "The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving . . . appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional."[7]

I think that this branch of the "compelling interest" doctrine is sound when applied to racial classifications, for historically the Equal Protection Clause was largely a product of the desire to eradicate legal distinctions founded upon race. However, I believe that the more recent extensions have been unwise. For the reasons stated in my dissenting opinion in *Harper* v. *Virginia Bd. of Elections, supra,* at 680, 683–686, I do not consider wealth a "suspect" statutory criterion. And when, as in *Williams* v. *Rhodes, supra,* and the present case, a classification is based upon the exercise of rights guaranteed against state infringement by the Federal Constitution, then there is no need for any resort to the Equal Protection Clause; in such instances, this Court may properly and straightforwardly invalidate any undue burden upon those rights under the Fourteenth Amendment's Due Process Clause. See, *e. g.,* my separate opinion in *Williams* v. *Rhodes, supra,* at 41.

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[6] See n. 9, *infra.*

[7] See n. 9, *infra.*

The second branch of the "compelling interest" principle is even more troublesome. For it has been held that a statutory classification is subject to the "compelling interest" test if the result of the classification may be to affect a "fundamental right," regardless of the basis of the classification. This rule was foreshadowed in *Skinner* v. *Oklahoma*, 316 U. S. 535, 541 (1942), in which an Oklahoma statute providing for compulsory sterilization of "habitual criminals" was held subject to "strict scrutiny" mainly because it affected "one of the basic civil rights." After a long hiatus, the principle re-emerged in *Reynolds* v. *Sims,* 377 U. S. 533, 561–562 (1964), in which state apportionment statutes were subjected to an unusually stringent test because "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.,* at 562. The rule appeared again in *Carrington* v. *Rash,* 380 U. S. 89, 96 (1965), in which, as I now see that case,[8] the Court applied an abnormally severe equal protection standard to a Texas statute denying certain servicemen the right to vote, without indicating that the statutory distinction between servicemen and civilians was generally "suspect." This branch of the doctrine was also an alternate ground in *Harper* v. *Virginia Bd. of Elections, supra,* see 383 U. S., at 670, and apparently was a basis of the holding in *Williams* v. *Rhodes, supra.*[9] It has reappeared today in the Court's cryptic suggestion, *ante,* at 627, that the "compelling interest" test is applicable merely because the result of the classification may be to deny the appellees "food, shelter, and other necessities of life," as well as in the Court's statement, *ante,* at 638, that "[s]ince the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest." [10]

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[8] I recognize that in my dissenting opinion in *Harper* v. *Virginia Bd. of Elections, supra,* at 683, I characterized the test applied in *Carrington* as "the traditional equal protection standard." I am now satisfied that this was too generous a reading of the Court's opinion.

[9] Analysis is complicated when the statutory classification is grounded upon the exercise of a "fundamental" right. For then the statute may come within the first branch of the "compelling interest" doctrine because exercise of the right is deemed a "suspect" criterion and also within the second because the statute is considered to affect the right by deterring its exercise. *Williams* v. *Rhodes, supra,* is such a case insofar as the statutes involved both inhibited exercise of the

I think this branch of the "compelling interest" doctrine particularly unfortunate and unnecessary. It is unfortunate because it creates an exception which threatens to swallow the standard equal protection rule. Virtually every state statute affects important rights. This Court has repeatedly held, for example, that the traditional equal protection standard is applicable to statutory classifications affecting such fundamental matters as the right to pursue a particular occupation,[11] the right to receive greater or smaller wages [12] or to work more or less hours,[13] and the right to inherit property.[14] Rights such as these are in principle indistinguishable from those involved here, and to extend the "compelling interest" rule to all cases in which such rights are affected would go far toward making this Court a "super-legislature." This branch of the doctrine is also unnecessary. When the right affected is one assured by

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right of political association and drew distinctions based upon the way the right was exercised. The present case is another instance, insofar as welfare residence statutes both deter interstate movement and distinguish among welfare applicants on the basis of such movement. Consequently, I have not attempted to specify the branch of the doctrine upon which these decisions rest.

[10] See n. 9, *supra.*

[11] See, *e. g., Williamson* v. *Lee Optical Co.,* 348 U. S. 483 (1955); *Kotch* v. *Board of River Pilot Comm'rs,* 330 U. S. 552 (1947).

[12] See, *e. g., Bunting* v. *Oregon,* 243 U. S. 426 (1917).

[13] See, *e. g., Miller* v. *Wilson,* 236 U. S. 373 (1915).

[14] See, *e. g., Ferry* v. *Spokane, P. & S. R. Co.,* 258 U. S. 314 (1922).

the Federal Constitution, any infringement can be dealt with under the Due Process Clause. But when a statute affects only matters not mentioned in the Federal Constitution and is not arbitrary or irrational, I must reiterate that I know of nothing which entitles this Court to pick out particular human activities, characterize them as "fundamental," and give them added protection under an unusually stringent equal protection test.

I shall consider in the next section whether welfare residence requirements deny due process by unduly burdening the right of interstate travel. If the issue is regarded purely as one of equal protection, then, for the reasons just set forth, this nonracial classification should be judged by ordinary equal protection standards. The applicable criteria are familiar and well established. A legislative measure will be found to deny equal protection only if "it is without any reasonable basis and therefore is purely arbitrary." *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78 (1911). It is not enough that the measure results incidentally "in some inequality," or that it is not drawn "with mathematical nicety," *ibid.;* the statutory classification must instead cause "different treatments . . . so disparate, relative to the difference in classification, as to be wholly arbitrary." *Walters* v. *City of St. Louis,* 347 U. S. 231, 237 (1954). Similarly, this Court has stated that where, as here, the issue concerns the authority of Congress to withhold "a noncontractual benefit under a social welfare program . . . , the Due Process Clause [of the Fifth Amendment] can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming* v. *Nestor,* 363 U. S. 603, 611 (1960).

For reasons hereafter set forth, see *infra,* at 672–677, a legislature might rationally find that the imposition of a welfare residence requirement would aid in the accomplishment of at least four valid governmental objectives. It might also find that residence requirements have advantages not shared by other methods of achieving the same goals. In light of this undeniable relation of residence requirements to valid legislative aims, it cannot be said that the requirements are "arbitrary" or "lacking in rational justification." Hence, I can find no objection to these residence requirements under the Equal Protection Clause of the Fourteenth Amendment or under the analogous standard embodied in the Due Process Clause of the Fifth Amendment.

III.

The next issue, which I think requires fuller analysis than that deemed necessary by the Court under its equal protection rationale, is whether a one-year welfare residence requirement amounts to an undue burden upon the right of interstate travel. Four considerations are relevant: *First,* what is the constitutional source and nature of the right to travel which is relied upon? *Second,* what is the extent of the interference with that right? *Third,* what governmental interests are served by welfare residence requirements? *Fourth,* how should the balance of the competing considerations be struck?

The initial problem is to identify the source of the right to travel asserted by the appellees. Congress enacted the welfare residence requirement in the District of Columbia, so the right to travel which is invoked in that case must be enforceable against *congressional* action. The residence requirements challenged in the Pennsylvania and Connecticut appeals were authorized by Congress in 42 U. S. C. § 602 (b), so the right to travel relied upon in those cases must be enforceable against the States even though they have acted with congressional approval.

In my view, it is playing ducks and drakes with the statute to argue, as the Court does, *ante,* at 639–641, that Congress did not mean to *approve* these state residence requirements. In 42 U. S. C. § 602 (b), quoted more fully, *ante,* at 638–639, Congress directed that:

> "[t]he Secretary shall approve any [state assistance] plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for [AFDC aid] a residence requirement [equal to or greater than one year]."

I think that by any fair reading this section must be regarded as conferring congressional approval upon any plan containing a residence requirement of up to one year.

If any reinforcement is needed for taking this statutory language at face value, the overall scheme of the AFDC program and the context in which it was enacted suggest strong reasons why Congress would have wished to approve limited state residence requirements. Congress determined to enlist state assistance in financing the AFDC program, and to administer the program primarily through the States. A previous Congress had already enacted a one-year residence requirement with respect to aid for dependent children in the District of Columbia.[15] In these circumstances, I think it only sensible to conclude that in allowing the States to impose limited residence conditions despite their possible impact on persons who wished to move interstate,[16] Congress was motivated by a desire to encourage state participation in the AFDC program,[17] as well as by a feeling that the States should at least be permitted to impose residence requirements as strict as that already authorized for the District of Columbia. Congress therefore had a genuine federal purpose in allowing the States to use residence tests. And I fully agree with THE CHIEF JUSTICE that this purpose would render § 602 (b) a permissible exercise of Congress' power under the Commerce Clause, unless Congress were prohibited from acting by another provision of the Constitution.

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[15] See 44 Stat. 758, § 1.

[16] The arguments for and against welfare residence requirements, including their impact on indigent migrants, were fully aired in congressional committee hearings. See, *e. g.,* Hearings on H. R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess., 831–832, 861–871 (1935); Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., 522–540, 643, 656 (1935).

Nor do I find it credible that Congress intended to refrain from expressing approval of state residence requirements because of doubts about their constitutionality or their compatibility with the Act's beneficent purposes. With respect to constitutionality, a similar residence requirement was already in effect for the District of Columbia, and the burdens upon travel which might be caused by such requirements must, even in 1935, have been regarded as within the competence of Congress under its commerce power. If Congress had thought residence requirements entirely incompatible with the aims of the Act, it could simply have provided that state assistance plans containing such requirements should not be approved at all, rather than having limited approval to plans containing residence requirements of less than one year. Moreover, when Congress in 1944 revised the AFDC program in the District of Columbia to conform with the standards of the Act, it chose to condition eligibility upon one year's residence,[18] thus strongly indicating that it doubted neither the constitutionality of such a provision nor its consistency with the Act's purposes.[19]

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[17] I am not at all persuaded by the Court's argument that Congress' sole purpose was to compel " '[l]iberality of residence requirement.' " See *ante*, at 640. If that was the only objective, it could have been more effectively accomplished by specifying that to qualify for approval under the Act a state assistance plan must contain *no* residence requirement.

[18] See Act to provide aid to dependent children in the District of Columbia § 3, 58 Stat. 277 (1944). In 1962, this Act was repealed

Opinions of this Court and of individual Justices have suggested four provisions of the Constitution as possible sources of a right to travel enforceable against the federal or state governments: the Commerce Clause;[20] the Privileges and Immunities Clause of Art. IV, § 2;[21] the Privileges and Immunities Clause of the Fourteenth Amendment;[22] and the Due Process Clause of the Fifth Amendment.[23] The Commerce Clause can be of no assistance to these appellees, since that clause grants plenary power to Congress,[24] and Congress either enacted or approved all of the residence requirements here challenged. The Privileges and Immunities Clause of Art. IV, § 2,[25] is irrelevant, for it appears settled that this clause neither limits federal power nor prevents a State from distinguishing among its own citizens, but simply "prevents a State from discriminating against citizens of other States in favor of its own." *Hague* v. *CIO*, 307 U. S. 496, 511 (1939) (opinion of Roberts, J.); see *Slaughter-House Cases*, 16 Wall. 36, 77 (1873). Since Congress enacted the District of Columbia residence statute, and since the Pennsylvania and Connecticut appellees were residents

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and replaced by D. C. Code § 3-203, the provision now being challenged. See 76 Stat. 914.

[19] Cf. *ante*, at 639-641 and nn. 24-25.

[20] See, *e. g.*, *Edwards* v. *California*, 314 U. S. 160 (1941); the *Passenger Cases*, 7 How. 283 (1849).

[21] See, *e. g.*, *Corfield* v. *Coryell*, 6 F. Cas. 546 (No. 3230) (1825) (Mr. Justice Washington).

[22] See, *e. g.*, *Edwards* v. *California*, 314 U. S. 160, 177, 181 (1941) (DOUGLAS and Jackson, JJ., concurring); *Twining* v. *New Jersey*, 211 U. S. 78, 97 (1908) (dictum).

[23] See, *e. g.*, *Kent* v. *Dulles*, 357 U. S. 116, 125-127 (1958); *Aptheker* v. *Secretary of State*, 378 U. S. 500, 505-506 (1964).

[24] See, *e. g.*, *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 423 (1946). See also *Maryland* v. *Wirtz*, 392 U. S. 183, 193-199 (1968).

[25] "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

and therefore citizens of those States when they sought welfare, the clause can have no application in any of these cases.

The Privileges and Immunities Clause of the Fourteenth Amendment provides that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It is evident that this clause cannot be applicable in the District of Columbia appeal, since it is limited in terms to instances of state action. In the Pennsylvania and Connecticut cases, the respective States did impose and enforce the residence requirements. However, Congress approved these requirements in 42 U. S. C. § 602 (b). The fact of congressional approval, together with this Court's past statements about the nature of the Fourteenth Amendment Privileges and Immunities Clause, leads me to believe that the clause affords no additional help to these appellees, and that the decisive issue is whether Congress itself may impose such requirements. The view of the Privileges and Immunities Clause which has most often been adopted by the Court and by individual Justices is that it extends only to those "privileges and immunities" which "arise or grow out of the relationship of United States citizens to the national government." *Hague* v. *CIO,* 307 U. S. 496, 520 (1939) (opinion of Stone, J.).[26] On the authority of *Crandall* v. *Nevada,* 6 Wall. 35 (1868), those privileges and immunities have repeatedly been said to include the right to travel from State to State,[27] presumably for the reason assigned in *Crandall:* that state restrictions on travel might interfere with intercourse between the Federal Government and its citizens.[28] This kind of objection to state welfare residence requirements would seem necessarily to vanish in the face of congressional authorization, for except in those instances when its authority is limited by a constitutional provision binding upon it (as the Fourteenth Amendment is not), Congress has full power to define the relationship between citizens and the Federal Government.

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[26] See *Slaughter-House Cases,* 16 Wall. 36, 79 (1873); *In re Kemmler,* 136 U. S. 436, 448 (1890); *McPherson* v. *Blacker,* 146 U. S. 1, 38 (1892); *Giozza* v. *Tiernan,* 148 U. S. 657, 661 (1893); *Duncan* v. *Missouri,* 152 U. S. 377, 382 (1894); *Twining* v. *New Jersey,* 211 U. S. 78, 97–98 (1908).

[27] See, *e. g., Slaughter-House Cases, supra,* at 79; *Twining* v. *New Jersey, supra,* at 97.

Some Justices, notably the dissenters in the *Slaughter-House Cases,* 16 Wall. 36, 83, 111, 124 (1873) (Field, Bradley, and Swayne, JJ., dissenting), and the concurring Justices in *Edwards* v. *California,* 314 U. S. 160, 177, 181 (1941) (DOUGLAS and Jackson, JJ., concurring), have gone further and intimated that the Fourteenth Amendment right to travel interstate is a concomitant of federal citizenship which stems from sources even more basic than the need to protect citizens in their relations with the Federal Government. The *Slaughter-House* dissenters suggested that the privileges and immunities of national citizenship, including freedom to travel, were those natural rights "which of right belong to the citizens of all free governments," 16 Wall., at 98 (Field, J.). However, since such rights are "the rights of citizens of any free government," *id.,* at 114 (Bradley, J.), it would appear that they must be immune from national as well as state abridgment. To the extent that they may be validly limited by Congress, there would seem to be no reason why they may not be similarly abridged by States acting with congressional approval.

The concurring Justices in *Edwards* laid emphasis not upon natural rights but upon a generalized concern for the functioning of the federal system, stressing that to allow a State to curtail "the rights of *national* citizenship would be to contravene every conception of national unity," 314 U. S., at 181 (DOUGLAS, J.), and that "[i]f national citizenship means less than [the right to move interstate] it means nothing." *Id.,* at 183 (Jackson, J.). However, even under this rationale the clause would appear to oppose no obstacle to congressional delineation of the rights of national citizenship, insofar as Congress may do so without infringing other provisions of the Constitution. Mr. Justice Jackson explicitly recognized in *Edwards* that: "The right of the citizen to migrate from state to state . . . [is] subject to all constitutional limitations imposed by the federal government," *id.,* at 184. And nothing in the nature of federalism would seem to prevent Congress from authorizing the States to do what Congress might validly do itself. Indeed, this Court has held, for example, that Congress may empower the States to undertake regulations of commerce which would otherwise be prohibited by the negative implications of the Commerce Clause. See *Prudential Ins. Co.* v. *Benjamin,* 328 U. S. 408 (1946). Hence, as has already been suggested, the decisive question is whether Congress may legitimately enact welfare residence requirements, and the Fourteenth Amendment Privileges and Immunities Clause adds no extra force to the appellees' attack on the requirements.

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[28] The *Crandall* Court stressed the "right" of a citizen to come to the national capital, to have access to federal officials, and to travel to seaports. See 6 Wall., at 44. Of course, *Crandall* was decided before the enactment of the Fourteenth Amendment.

The last possible source of a right to travel is one which does operate against the Federal Government: the Due Process Clause of the Fifth Amendment.[29] It is now settled that freedom to travel is an element of the "liberty" secured by that clause. In *Kent* v. *Dulles,* 357 U. S. 116, 125–126 (1958), the Court said:

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[29] Professor Chafee has suggested that the Due Process Clause of the Fourteenth Amendment may similarly protect the right to travel against state interference. See Z. Chafee, Three Human Rights in the Constitution of 1787, p. 192 (1956). However, that clause surely provides no greater protection against the States than does the Fifth Amendment clause against the Federal Government; so the decisive question still is whether Congress may enact a residence requirement.

> "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. . . . Freedom of movement across frontiers . . . , and inside frontiers as well, was a part of our heritage. . . ."

The Court echoed these remarks in *Aptheker* v. *Secretary of State,* 378 U. S. 500, 505–506 (1964), and added:

> "Since this case involves a personal liberty protected by the Bill of Rights, we believe that the proper approach to legislation curtailing that liberty must be that adopted by this Court in *NAACP* v. *Button,* 371 U. S. 415, and *Thornhill* v. *Alabama,* 310 U. S. 88. . . . [S]ince freedom of travel is a constitutional liberty closely related to rights of free speech and association, we believe that appellants . . . should not be required to assume the burden of demonstrating that Congress could not have written a statute constitutionally prohibiting their travel." *Id.,* at 516–517.

However, in *Zemel* v. *Rusk,* 381 U. S. 1 (1965), the First Amendment cast of the *Aptheker* opinion was explained as having stemmed from the fact that Aptheker was forbidden to travel because of "expression or association on his part," *id.,* at 16. The Court noted that Zemel was "not being forced to choose between membership in an organization and freedom to travel," *ibid.,* and held that the mere circumstance that Zemel's proposed journey to Cuba might be used to collect information of political and social significance was not enough to bring the case within the First Amendment category.

Finally, in *United States* v. *Guest,* 383 U. S. 745 (1966), the Court again had occasion to consider the right of interstate travel. Without specifying the source of that right, the Court said:

> "The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized. . . . [The] right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution." *Id.,* at 757–758. (Footnotes omitted.)

I therefore conclude that the right to travel interstate is a "fundamental" right which, for present purposes, should be regarded as having its source in the Due Process Clause of the Fifth Amendment.

The next questions are: (1) To what extent does a one-year residence condition upon welfare eligibility interfere with this right to travel?; and (2) What are the governmental interests supporting such a condition? The consequence of the residence requirements is that persons who contemplate interstate changes of residence, and who believe that they otherwise would qualify for welfare payments, must take into account the fact that such assistance will not be available for a year after arrival. The number or proportion of persons who are actually deterred from changing residence by the existence of these provisions is unknown. If one accepts evidence put forward by the appellees,[30] to the effect that there would be only a minuscule increase in the number of welfare applicants were existing residence requirements to be done away with, it follows that the requirements do not deter an appreciable number of persons from moving interstate.

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[30] See Brief for Appellees in No. 33, pp. 49–51 and n. 70; Brief for Appellees in No. 34, p. 24, n. 11; Supplemental Brief for Appellees on Reargument 27–30.

Against this indirect impact on the right to travel must be set the interests of the States, and of Congress with respect to the District of Columbia, in imposing residence conditions. There appear to be four such interests. First, it is evident that a primary concern of Congress and the Pennsylvania and Connecticut Legislatures was to deny welfare benefits to persons who moved into the jurisdiction primarily in order to collect those benefits.[31] This seems to me an entirely legitimate objective. A legislature is certainly not obliged to furnish welfare assistance to every inhabitant of the jurisdiction, and it is entirely rational to deny benefits to those who enter primarily in order to receive them, since this will make more funds available for those whom the legislature deems more worthy of subsidy.[32]

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[31] For Congress, see, *e. g.*, Problems of Hungry Children in the District of Columbia, Hearings before the Subcommittee on Public Health, Education, Welfare, and Safety of the Senate Committee on the District of Columbia, 85th Cong., 1st Sess. For Connecticut, see Connecticut General Assembly, 1965 Feb. Spec. Sess., House of Representatives Proceedings, Vol. II, pt. 7, at 3505. For Pennsylvania, see Appendix in No. 34, pp. 96a–98a.

[32] There is support for the view that enforcement of residence requirements can significantly reduce welfare costs by denying benefits to those who come solely to collect them. For example, in the course of a long article generally critical of residence requirements, and after a detailed discussion of the available information, Professor Harvith has stated:

"A fair conclusion seems to be that, in at least some states, it is not unreasonable for the legislature to conclude that a useful saving in welfare costs may be obtained by residence tests discouraging those who would enter the state solely because of its welfare programs. In New York, for example, a one per cent saving in

A second possible purpose of residence requirements is the prevention of fraud. A residence requirement provides an objective and workable means of determining that an applicant intends to remain indefinitely within the jurisdiction. It therefore may aid in eliminating fraudulent collection of benefits by nonresidents and persons already receiving assistance in other States. There can be no doubt that prevention of fraud is a valid legislative goal. Third, the requirement of a fixed period of residence may help in predicting the budgetary amount which will be needed for public assistance in the future. While none of the appellant jurisdictions appears to keep data sufficient to permit the making of detailed budgetary predictions in consequence of the requirement,[33] it is probable that in the event of a very large increase or decrease in the number of indigent newcomers the waiting period would give the legislature time to make needed adjustments in the welfare laws. Obviously, this is a proper objective. Fourth, the residence requirements conceivably may have been predicated upon a legislative desire to restrict welfare payments financed in part by state tax funds to persons who have

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welfare costs would amount to several million dollars." Harvith, The Constitutionality of Residence Tests for General and Categorical Assistance Programs, 54 Calif. L. Rev. 567, 618 (1966). (Footnotes omitted.) See also *Helvering* v. *Davis*, 301 U. S. 619, 644 (1937).

For essentially the same reasons, I would uphold the Connecticut welfare regulations which except from the residence requirement persons who come to Connecticut with a bona fide job offer or with resources sufficient to support them for three months. See 1 Conn. Welfare Manual, c. II, §§ 219.1–219.2 (1966). Such persons are very unlikely to have entered the State primarily in order to receive welfare benefits.

[33] For precise prediction to be possible, it would appear that a residence requirement must be combined with a procedure for ascertaining the number of indigent persons who enter the jurisdiction and the proportion of those persons who will remain indigent during the residence period.

recently made some contribution to the State's economy, through having been employed, having paid taxes, or having spent money in the State. This too would appear to be a legitimate purpose.[34]

The next question is the decisive one: whether the governmental interests served by residence requirements outweigh the burden imposed upon the right to travel. In my view, a number of considerations militate in favor of constitutionality. First, as just shown, four separate, legitimate governmental interests are furthered by residence requirements. Second, the impact of the requirements upon the freedom of individuals to travel interstate is indirect and, according to evidence put forward by the appellees themselves, insubstantial. Third, these are not cases in which a State or States, acting alone, have attempted to interfere with the right of citizens to travel, but one in which the States have acted within the terms of a limited authorization by the National Government, and in which Congress itself has laid down a like rule for the District of Columbia. Fourth, the legislatures which enacted these statutes have been fully exposed to the arguments of the appellees as to why these residence requirements are unwise, and have rejected them. This is not, therefore, an instance in which legislatures have acted without mature deliberation.

Fifth, and of longer-range importance, the field of welfare assistance is one in which there is a widely recognized need for fresh solutions and consequently for experimentation. Invalidation of welfare residence requirements might have the unfortunate consequence of discouraging the Federal and State Governments from establishing unusually generous welfare programs in particular areas on an experimental basis, because of fears that the program would cause an influx of persons seeking higher welfare payments. Sixth and finally, a strong presumption of constitutionality attaches to statutes of the types now before us. Congressional enactments come to this Court with an extremely heavy presumption of validity. See, *e. g., Brown* v. *Maryland,* 12 Wheat. 419, 436 (1827); *Insurance Co.* v. *Glidden Co.,* 284 U. S. 151, 158 (1931); *United States* v. *Butler,* 297 U. S. 1, 67 (1936); *United States* v. *National Dairy Corp.,* 372 U. S. 29, 32 (1963). A similar presumption of constitutionality attaches to state statutes, particularly when, as here, a State has acted upon a specific authorization from Congress. See, *e. g., Powell* v. *Pennsylvania,* 127 U. S. 678, 684–685 (1888); *United States* v. *Des Moines N. & R. Co.,* 142 U. S. 510, 544–545 (1892).

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[34] I do not mean to imply that each of the above purposes necessarily was sought by each of the legislatures that adopted durational residence requirements. In Connecticut, for example, the welfare budget is apparently open-ended, suggesting that this State is not seriously concerned with the need for more accurate budgetary estimates.

I do not consider that the factors which have been urged to outweigh these considerations are sufficient to render unconstitutional these state and federal enactments. It is said, first, that this Court, in the opinions discussed, *supra,* at 669–671, has acknowledged that the right to travel interstate is a "fundamental" freedom. Second, it is contended that the governmental objectives mentioned above either are ephemeral or could be accomplished by means which do not impinge as heavily on the right to travel, and hence that the requirements are unconstitutional because they "sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama,* 377 U. S. 288, 307 (1964). The appellees claim that welfare payments could be denied those who come primarily to collect welfare by means of less restrictive provisions, such as New York's

Welfare Abuses Law;[35] that fraud could be prevented by investigation of individual applicants or by a much shorter residence period; that budgetary predictability is a remote and speculative goal; and that assurance of investment in the community could be obtained by a shorter residence period or by taking into account prior intervals of residence in the jurisdiction.

Taking all of these competing considerations into account, I believe that the balance definitely favors constitutionality. In reaching that conclusion, I do not minimize the importance of the right to travel interstate. However, the impact of residence conditions upon that right is indirect and apparently quite insubstantial. On the other hand, the governmental purposes served by the requirements are legitimate and real, and the residence requirements are clearly suited to their accomplishment. To abolish residence requirements might well discourage highly worthwhile experimentation in the welfare field. The statutes come to us clothed with the authority of Congress and attended by a correspondingly heavy presumption of constitutionality. Moreover, although the appellees assert that the same objectives could have been achieved by less restrictive means, this is an area in which the judiciary should be especially slow to fetter the judgment of Congress and of some 46 state legislatures[36] in the choice of methods. Residence requirements have advantages, such as administrative simplicity and relative certainty, which are not shared by the alternative solutions proposed by the appellees. In these circumstances, I cannot find that the burden imposed by residence requirements upon ability to travel outweighs the governmental interests in their continued employment. Nor do I believe that the period of residence required in these cases—one year—is so excessively long as to justify a finding of unconstitutionality on that score.

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[35] That law, N. Y. Soc. Welfare Law § 139–a, requires public welfare officials to conduct a detailed investigation in order to ascertain whether a welfare "applicant came into the state for the purpose of receiving public assistance or care and accordingly is undeserving of and ineligible for assistance . . . ."

[36] The figure may be variously calculated. There was testimony before the District Court in the Pennsylvania case that 46 States had some form of residence requirement for welfare assistance. Appendix in No. 34, pp. 92a–93a. It was stipulated in the Connecticut case that in 1965, 40 States had residence requirements for aid to dependent children. Appendix to Appellant's Brief in No. 9, p. 45a. See also *ante,* at 639–640 and n. 22.

I conclude with the following observations. Today's decision, it seems to me, reflects to an unusual degree the current notion that this Court possesses a peculiar wisdom all its own whose capacity to lead this Nation out of its present troubles is contained only by the limits of judicial ingenuity in contriving new constitutional principles to meet each problem as it arises. For anyone who, like myself, believes that it is an essential function of this Court to maintain the constitutional divisions between state and federal authority and among the three branches of the Federal Government, today's decision is a step in the wrong direction. This resurgence of the expansive view of "equal protection" carries the seeds of more judicial interference with the state and federal legislative process, much more indeed than does the judicial application of "due process" according to traditional concepts (see my dissenting opinion in *Duncan* v. *Louisiana,* 391 U. S. 145, 171 (1968)), about which some members of this Court have expressed fears as to its potentialities for setting us judges "at large."[37] I consider it particularly unfortunate that this judicial roadblock to the powers of Congress in this field should occur at the very threshold of the current discussions regarding the "federalizing" of these aspects of welfare relief.

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[37] Cf. *Harper* v. *Virginia Bd. of Elections,* 383 U. S. 663, 670, 675-680 (BLACK, J., dissenting).

UNITED STATES *v.* SKELLY OIL CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 280. Argued January 15, 1969.—
Decided April 21, 1969.

Respondent, a natural gas producer, in 1958 refunded $505,536 to two customers for excess amounts it had collected during the previous six years under a minimum price order which this Court subsequently invalidated. In its tax returns for those years respondent included that sum in its gross income and it also included that amount in its "gross income from the property," which § 613 of the Internal Revenue Code of 1954 makes the basis for the 27½% depletion allowed upon the production of oil and natural gas. Respondent's actual increase in taxable income attributable to the receipts in question was thus $366,513. However, in its tax return for 1958 respondent attempted to deduct the $505,536, claiming that § 1341 permitted it to deduct the full amount of the overcharges refunded to respondent's customers. Under that section income which a taxpayer receives under a claim of right is included as gross income in the year of receipt and under § 1341 (a)(4) (on which respondent relies here) a deduction may be claimed in the year of repayment. Section 1341 applies if (1) "an item was included in gross income for a prior taxable year (or years)" under a claim of right; (2) "a deduction is allowable for the taxable year because it was established after the close of such prior taxable year (or years) that the taxpayer did not have an unrestricted right to such item"; and (3) the deduction exceeds $3,000. The Commissioner reduced the amount of the deduction by the 27½% depletion allowance which respondent had taken in its returns for the years 1952–1957. Respondent paid the deficiency and after disallowance of its claim instituted this action for a refund. The District Court upheld the Commissioner but the Court of Appeals reversed. *Held:* Under § 1341 of the Internal Revenue Code of 1954 the deduction allowable in the year of repayment must be reduced by the percentage depletion allowance granted respondent in the years of receipt as a result of the inclusion of the later-refunded items in respondent's "gross income from the property" in those years, since Congress did not intend to give taxpayers, and the Code should not be interpreted as allowing, a deduction for refunding money that was not taxed when received. Pp. 680–687.

392 F. 2d 128, reversed and remanded.

Solicitor General Griswold argued the cause for the United States. With him on the brief were *Assistant Attorney General Rogovin, Harris Weinstein, Myron C. Baum,* and *Loring W. Post.*

Robert L. Casey argued the cause for respondent. With him on the brief were *Thomas E. Tyre, John A. Craig,* and *Thomas J. McCoy, Jr.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

During its tax year ending December 31, 1958, respondent refunded $505,536.54 to two of its customers for overcharges during the six preceding years. Respondent, an Oklahoma producer of natural gas, had set its prices during the earlier years in accordance with a minimum price order of the Oklahoma Corporation Commission. After that order was vacated as a result of a decision of this Court, *Michigan Wisconsin Pipe Line Co.* v. *Corporation Comm'n of Oklahoma,* 355 U. S. 425 (1958), respondent found it necessary to settle a number of claims filed by its customers; the repayments in question represent settlements of two of those claims. Since respondent had claimed an unrestricted right to its sales receipts during the years 1952 through 1957, it had included the $505,536.54 in its gross income in those years. The amount was also included in respondent's "gross income from the property" as defined in § 613 of the Internal Revenue Code of 1954, the section which allows taxpayers to deduct a fixed percentage of certain receipts to compensate for the depletion of natural resources from which they derive income. Allowable percentage depletion for receipts from oil and gas wells is fixed at 27½% of the "gross income from the property." Since respondent claimed and the Commissioner allowed percentage depletion deductions during these years, 27½% of the receipts in question was added to the depletion allowances to which respondent would otherwise have been entitled. Accordingly, the actual increase in respondent's taxable income attributable to the receipts in question was not $505,536.54, but only $366,513.99. Yet, when respondent made its refunds in 1958, it attempted to deduct the full $505,536.54. The Commissioner objected and assessed a deficiency. Respondent paid and, after its claim for a refund had been disallowed, began the present suit. The Government won in the District Court, 255 F. Supp. 228 (D. C. N. D. Okla. 1966), but the Court of Appeals for the Tenth Circuit reversed, 392 F. 2d 128 (1968). Upon petition by the Government, we granted certiorari, 393 U. S. 820 (1968), to consider whether the Court of Appeals decision had allowed respondent "the practical equivalent of double deduction," *Charles Ilfeld Co.* v. *Hernandez,* 292 U. S. 62, 68 (1934), in conflict with past decisions of this Court and sound principles of tax law. We reverse.

I.

The present problem is an outgrowth of the so-called "claim-of-right" doctrine. Mr. Justice Brandeis, speaking for a unanimous Court in *North American Oil Consolidated* v. *Burnet,* 286 U. S. 417, 424 (1932), gave that doctrine its classic formulation. "If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent." Should it later appear that the taxpayer was not entitled to keep the money, Mr. Justice Brandeis explained, he would be entitled to a deduction in the year of repayment; the taxes due for the year of receipt would not be affected. This approach was dictated by Congress' adoption of an annual accounting system as an integral part of the tax code. See *Burnet* v. *Sanford & Brooks Co.,* 282 U. S. 359, 365–366 (1931). Of course, the tax benefit from the deduction in the year of repayment might differ from the increase in taxes attributable to the receipt; for example, tax rates might have changed, or the taxpayer might be in a different tax "bracket." See *Healy* v. *Commissioner,* 345 U. S. 278, 284–285 (1953). But as the doctrine was originally formulated, these discrepancies were accepted as an unavoidable consequence of the annual accounting system.

Section 1341 of the 1954 Code was enacted to alleviate some of the inequities which Congress felt existed in this area.[1] See H. R. Rep. No. 1337, 83d Cong., 2d Sess.,

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[1] Section 1341 (a) provides:

"If—

"(1) an item was included in gross income for a prior taxable year (or years) because it appeared that the taxpayer had an unrestricted right to such item;

"(2) a deduction is allowable for the taxable year because it was established after the close of such prior taxable year (or years) that the taxpayer did not have an unrestricted right to such item or to a portion of such item; and

"(3) the amount of such deduction exceeds $3,000,

"then the tax imposed by this chapter for the taxable year shall be the lesser of the following:

"(4) the tax for the taxable year computed with such deduction; or

"(5) an amount equal to—

"(A) the tax for the taxable year computed without such deduction, minus

"(B) the decrease in tax under this chapter (or the corresponding provisions of prior revenue laws) for the prior taxable year (or years) which would result solely from the exclusion of such item (or portion thereof) from gross income for such prior taxable year (or years).

"For purposes of paragraph (5)(B), the corresponding provisions of the Internal Revenue Code of 1939 shall be chapter 1 of such code

86-87 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess., 118-119 (1954). As an alternative to the deduction in the year of repayment[2] which prior law allowed, § 1341 (a)(5) permits certain taxpayers to recompute their taxes for the year of receipt. Whenever § 1341 (a)(5) applies, taxes for the current year are to be reduced by the amount taxes were increased in the year or years of receipt because the disputed items were included in gross income. Nevertheless, it is clear that Congress did not intend to tamper with the underlying claim-of-right doctrine; it only provided an alternative for certain cases in which the new approach favored the taxpayer. When the new approach was not advantageous to the taxpayer, the old law was to apply under § 1341 (a)(4).

In this case, the parties have stipulated that § 1341 (a)(5) does not apply. Accordingly, as the courts below recognized, respondent's taxes must be computed under § 1341 (a)(4) and thus, in effect, without regard to the special relief Congress provided through the enactment of § 1341. Nevertheless, respondent argues, and the Court of Appeals seems to have held, that the language used in § 1341 requires that respondent be allowed a deduction for the full amount it refunded to its customers. We think the section has no such significance.

(other than subchapter E, relating to self-employment income) and subchapter E of chapter 2 of such code."

Section 1341 (b)(2) contains an exclusion covering certain cases involving sales of stock in trade or inventory. However, because of special treatment given refunds made by regulated public utilities, both parties agree that § 1341 (b)(2) is inapplicable to this case and that, accordingly, § 1341 (a) applies.

[2] In the case of an accrual-basis taxpayer, the legislative history makes it clear that the deduction is allowable at the proper time for accrual. H. R. Rep. No. 1337, 83d Cong., 2d Sess., A294 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess., 451-452 (1954).

In describing the situations in which the section applies, § 1341 (a)(2) talks of cases in which "a deduction is allowable for the taxable year because it was established after the close of [the year or years of receipt] that the taxpayer did not have an unrestricted right to such item . . . ." The "item" referred to is first mentioned in § 1341 (a)(1); it is the item included in gross income in the year of receipt. The section does not imply in any way that the "deduction" and the "item" must necessarily be equal in amount. In fact, the use of the words "a deduction" and the placement of § 1341 in subchapter Q—the subchapter dealing largely with side effects of the annual accounting system—make it clear that it is necessary to refer to other portions of the Code to discover how much of a deduction is allowable. The regulations promulgated under the section make the necessity for such a cross-reference clear. Treas. Reg. on Income Tax (1954 Code) § 1.1341-1 (26 CFR § 1.1341-1). Therefore, when § 1341 (a)(4)—the subsection applicable here—speaks of "the tax . . . computed with such deduction," it is referring to the deduction mentioned in § 1341 (a)(2); and that deduction must be determined, not by any mechanical equation with the "item" originally included in gross income, but by reference to the applicable sections of the Code and the case law developed under those sections.

II.

There is some dispute between the parties about whether the refunds in question are deductible as losses under § 165 of the 1954 Code or as business expenses under § 162.[3] Although in some situations the distinction may have relevance, cf. *Equitable Life Ins. Co. of*

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[3] The Commissioner has long recognized that a deduction under some section is allowable. G. C. M. 16730, XV-1 Cum. Bull. 179 (1936).

Iowa v. *United States,* 340 F. 2d 9 (C. A. 8th Cir. 1965), we do not think it makes any difference here. In either case, the Code should not be interpreted to allow respondent "the practical equivalent of double deduction," *Charles Ilfeld Co.* v. *Hernandez,* 292 U. S. 62, 68 (1934), absent a clear declaration of intent by Congress. See *United States* v. *Ludey,* 274 U. S. 295 (1927). Accordingly, to avoid that result in this case, the deduction allowable in the year of repayment must be reduced by the percentage depletion allowance which respondent claimed and the Commissioner allowed in the years of receipt as a result of the inclusion of the later-refunded items in respondent's "gross income from the property" in those years. Any other approach would allow respondent a total of \$1.27½ in deductions for every \$1 refunded to its customers.

Under the annual accounting system dictated by the Code, each year's tax must be definitively calculable at the end of the tax year. "It is the essence of any system of taxation that it should produce revenue ascertainable, and payable to the government, at regular intervals." *Burnet* v. *Sanford & Brooks Co., supra,* at 365. In cases arising under the claim-of-right doctrine, this emphasis on the annual accounting period normally requires that the tax consequences of a receipt should not determine the size of the deduction allowable in the year of repayment. There is no requirement that the deduction save the taxpayer the exact amount of taxes he paid because of the inclusion of the item in income for a prior year. See *Healy* v. *Commissioner, supra.*

Nevertheless, the annual accounting concept does not require us to close our eyes to what happened in prior years. For instance, it is well settled that the prior year may be examined to determine whether the repayment gives rise to a regular loss or a capital loss. *Arrow-*

smith v. *Commissioner,* 344 U. S. 6 (1952). The rationale for the *Arrowsmith* rule is easy to see; if money was taxed at a special lower rate when received, the taxpayer would be accorded an unfair tax windfall if repayments were generally deductible from receipts taxable at the higher rate applicable to ordinary income. The Court in *Arrowsmith* was unwilling to infer that Congress intended such a result.

This case is really no different.[4] In essence, oil and gas producers are taxed on only 72½% of their "gross income from the property" whenever they claim percentage depletion. The remainder of their oil and gas receipts is in reality tax exempt. We cannot believe that Congress intended to give taxpayers a deduction for refunding money that was not taxed when received. Cf. *O'Meara* v. *Commissioner,* 8 T. C. 622, 634–635 (1947). Accordingly, *Arrowsmith* teaches that the full amount of the repayment cannot, in the circumstances of this case, be allowed as a deduction.

This result does no violence to the annual accounting system. Here, as in *Arrowsmith,* the earlier returns are not being reopened. And no attempt is being made to require the tax savings from the deduction to equal the tax consequences of the receipts in prior years.[5] In addition, the approach here adopted will affect only a few cases. The percentage depletion allowance is quite unusual; unlike most other deductions provided by the Code, it allows a fixed portion of gross income to go untaxed. As a result, the depletion allowance increases in years when disputed amounts are received under claim of right; there is no corresponding decrease in the allowance because of later deductions for repayments.[6] Therefore, if a deduction for 100% of the repayments were allowed, every time money is received and later repaid the taxpayer would make a profit equivalent to the taxes on 27½% of the amount refunded. In other situations when the taxes on a receipt do not equal the tax benefits of a repayment, either the taxpayer or the Government may, depending on circumstances, be the beneficiary. Here, the taxpayer always wins and the Government always loses. We cannot believe that Congress would have intended such an inequitable result.

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[4] The analogy would be even more striking if in *Arrowsmith* the individual taxpayers had not utilized the alternative tax for capital gains, as they were permitted to do by what is now § 1201 of the 1954 Code. Where the 25% alternative tax is not used, individual taxpayers are taxed at ordinary rates on 50% of their capital gains. See § 1202. In such a situation, the rule of the *Arrowsmith* case prevents taxpayers from deducting 100% of an item refunded when they were taxed on only 50% of it when it was received. Although *Arrowsmith* prevents this inequitable result by treating the repayment as a capital loss, rather than by disallowing 50% of the deduction, the policy behind the decision is applicable in this case. Here it would be inequitable to allow a 100% deduction when only 72½% was taxed on receipt.

The parties have stipulated that respondent is entitled to a judgment for $20,932.64 plus statutory interest for claims unrelated to the matter in controversy here; the District Court entered a judgment for that amount. Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded to that court with instructions that it be returned to the District Court for re-entry of the original District Court judgment.

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[5] Compare the analogous approach utilized under the "tax benefit" rule. *Alice Phelan Sullivan Corp.* v. *United States,* 180 Ct. Cl. 659, 381 F. 2d 399 (1967); see Internal Revenue Code of 1954 § 111. In keeping with the analogy, the Commissioner has indicated that the Government will only seek to reduce the deduction in the year of repayment to the extent that the depletion allowance attributable to the receipt directly or indirectly reduced taxable income. Proposed Treas. Reg. § 1.613-2 (c)(8), 33 Fed. Reg. 10702-10703 (1968).

[6] The 10% standard deduction mentioned in MR. JUSTICE STEWART's dissent, *post,* at 697, differs in that it allows as a deduction a percentage of adjusted gross income, rather than of gross income. See § 141; cf. §§ 170, 213. As a result, repayments may in certain cases cause a decrease in the 10% standard deduction allowable in the year of repayment, assuming that the repayment is of the character to be deducted in calculating adjusted gross income. See § 62.

Reversed and remanded.

MR. JUSTICE DOUGLAS, dissenting.

I share MR. JUSTICE STEWART's views as to this case and add only a word.

If we sat in chancery reviewing tax cases, much of what the Court says would have appeal. But we do not sit to do equity in tax cases; that is one of Congress' main concerns.

The search for equity in the tax laws is wondrous and elusive. As Edmond Cahn said: "[T]hose only are equal whom the law has elected to equalize." E. Cahn, The Sense of Injustice 14 (1949).

Percentage depletion had its roots in granting a reward to men who go into undeveloped territory in search of oil and gas. But today it is granted anyone who has an interest in oil or gas; the beneficiary need not live the life of the oil wildcatter or bear his risks to obtain the benefits of percentage depletion.

When it comes to capital gains what "equities" are to be applied? Is it fair that earned income pay a heavier tax?

A son who spends $1,000 on his destitute father does not get the same tax benefit as he who pays a like sum to his alma mater. Louis Eisenstein pursues example after example of so-called inequities in tax laws in his book The Ideologies of Taxation (1961). For example, the profits on the sale of unbred pigs are taxable as ordinary income, while the profits on the sale of pigs once bred are taxable as capital gains. *Id.,* 174. The same is true of turkeys but not of chickens, even though "a bred chicken and a bred turkey are similarly situated. Each has feathers and two legs." *Ibid.*

Treasury recently noted numerous basic inequities resulting in preferred tax treatment for some people's dollars. Tax Reform Studies and Proposals, U. S. Treasury Dept., Joint Publication of House Committee on Ways and Means and Senate Committee on Finance, 91st Cong., 1st Sess., pt. 1, pp. 13–17 (Comm. Print 1969).

Apart from certain aspects of percentage depletion were the reduced taxation on long-term capital gains and the exclusion of interest on state and local government bonds. The examples are legion. The Tax Reform study gives an unusual example:

> "An individual had a total income of $1,284,718 of which $1,210,426 was in capital gains, the remaining $74,292 from wages, dividends, and interest. He excluded one-half of his capital gains, which he is allowed to do under present law, thereby reducing his present law (adjusted gross) income to $679,405 (after allowing for the $100 dividend exclusion). From this income he subtracted all his personal deductions, which amounted to $676,419 and which included $587,693 for interest on funds borrowed presumably for the purpose of purchasing the securities on which the capital gains were earned. As a result, after allowing $1,200 of personal exemptions his taxable income was reduced to $1,786 and he paid a tax of $274. His overall tax rate, therefore, was about two-hundredths of one percent." *Id.,* at 15.

This was made possible by using a taxpayer's deductions only against that part of his income which is subject to the tax, ignoring the excluded part.

Tax laws are indeed arbitrary; the lines they draw are the products of pressures inside the Congress with compromises carrying the day.

The Court of Appeals held that the "item" here in question was properly included in "gross income" prior to 1958 and was an allowable "deduction" in 1958 because the taxpayer did not have "an unrestricted right" to a "portion of such item," and that the amount of such deduction exceeds $3,000—all as provided in § 1341.[1] *Skelly Oil Co.* v. *United States,* 392 F. 2d 128, 131.

There is no irregularity on the face of the return. There is no conflict with any decision of any other Court of Appeals. We are asked, however, to put a gloss on the statute that Treasury desires. I would adhere to the construction given by the Court of Appeals leaving to Congress the correction of any inequities in the tax scheme.

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[1] Section 1341 reads as follows:

(a) General rule. If—

"(1) an item was included in gross income for a prior taxable year (or years) because it appeared that the taxpayer had an unrestricted right to such item;

"(2) a deduction is allowable for the taxable year because it was established after the close of such prior taxable year (or years) that the taxpayer did not have an unrestricted right to such item or to a portion of such item; and

"(3) the amount of such deduction exceeds $3,000,

"then the tax imposed by this chapter for the taxable year shall be the lesser of the following:

"(4) the tax for the taxable year computed with such deduction; or

"(5) an amount equal to—

"(A) the tax for the taxable year computed without such deduction, minus

"(B) the decrease in tax . . . for the prior taxable year . . . which would result solely from the exclusion of such item . . . from gross income for such prior taxable year . . . ."

The Congress many years ago created the Joint Committee on Internal Revenue Taxation, which is a standing committee. 26 U. S. C. §§ 8001–8005, 8021–8023. One of its statutory mandates is "[t]o investigate the operation and effects of the Federal system of internal revenue taxes." *Id.*, § 8022.

In that connection a recent report states:

> "[T]he Joint Committee staff has in recent years been used as a committee liaison with the Treasury Department in working on tax proposals for the committee. The staff aids the two tax committees in explaining provisions, in writing committee reports, and in aiding in the drafting of bills."

The Joint Committee makes regular reports to Congress for revision of the tax laws. Inequities that arise as a result of interpretations that are given existing laws either at the administrative or judicial level can be quickly corrected by this agency of oversight.[2]

Treasury unhappily has developed the habit of jockeying in the courts, testing one theory against another. In California, it may take one position and in Massachusetts the opposite position, the issue in each being the same. The hope is that conflicts over litigious and important issues will develop and the case will be brought here.[3]

If we were trained in the art and science of taxation, we might serve a useful function. But taxation is a specialty in which we have only sporadic and no continuous experience. It has been said that one of our decisions is like a "lightning bolt" that "illuminates only a very small portion of the landscape," leaving a darkness that later decisions do not remove. R. Paul, Studies in Federal Taxation 249–250 (3d series 1940). Our contributions, if such they can be called, are dubious indeed, for the Joint Committee can and does rewrite the Code frequently.

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[2] Perhaps the most egregious error that we made in my time (one for which I take partial blame), was *Helvering* v. *Hallock*, 309 U. S. 106, an opinion for the Court, written by Mr. Justice Frankfurter that overruled *Helvering* v. *St. Louis Trust Co.*, 296 U. S. 39, and *Becker* v. *St. Louis Trust Co.*, 296 U. S. 48. This is one classic example of the type of problem which should be left to the Joint Committee.

[3] For a classic example see R. Paul, Studies in Federal Taxation 449–450 (3d series 1940).

It is therefore the rare tax case [4] we should consider, except the even rarer constitutional case. The present case has no constitutional overtones; the taxpayer followed the words of the tax law literally, using no new or strained construction of words to find a tax advantage; there is no conflict between this case and any other decision. The Solicitor General only claims that the result reached by the Court of Appeals does not fit the neat logic which he finds in a group of related tax cases.

An account of the cost, confusion, and inequity in tax administration that ensues while everyone waits for a conflict among the Circuits (which takes at least 10 years) is related in Griswold, The Need for a Court of Tax Appeals, 57 Harv. L. Rev. 1153 (1944). The role we presently play was stated as follows:

> "Our present system of tax adjudication inevitably leaves nearly every question uncertain during the entire period while it must be dealt with, usually in thousands of instances, by the administrative officers. And yet that is just the period when there should be an authoritative rule if the system is to work smoothly, effectively, speedily, fairly, and

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[4] The validity of Regulations and the effect of re-enactment of a statutory provision on them present distinct questions. *Helvering* v. *Wilshire Oil Co.,* 308 U. S. 90; *Commissioner* v. *South Texas Co.,* 333 U. S. 496; *Commissioner* v. *Stidger,* 386 U. S. 287.

> without discrimination. Under our present system delay and discrimination are typical and inevitable." *Id.*, at 1161.

In absence of an unmistakably clear conflict among the Circuits, I would abide by the opinions of the Courts of Appeals in tax cases and leave to the Joint Committee whether the gloss which Treasury now tries to put on the statute is or is not desirable.

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE HARLAN join, dissenting.

The Court today denies the respondent a tax benefit fairly provided by the Code for no other discernible reasons than that, under the statute as written, "the taxpayer always wins and the Government always loses,"[1] and that "the approach here adopted will affect only a few cases." *Ante*, at 686. But we are not free, even in a few cases, to abandon settled principles of annual accounting and statutory construction merely to avoid what the Court thinks Congress might consider an "inequitable result."[2]

> "[T]he rule that general equitable considerations do not control the measure of deductions or tax benefits cuts both ways. It is as applicable to the

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[1] Section 1341, of course, is designed precisely to create a situation where "the taxpayer always wins and the Government always loses." Strict adherence to annual accounting and the claim-of-right doctrine before 1954 sometimes benefited the taxpayer, sometimes the Government. Section 1341 retains those principles where they benefit the taxpayer but allows recomputation of the taxes of a prior year if that method would result in a greater tax saving.

[2] Judicial assumptions that Congress did not intend liberal benefits for taxpayers are particularly suspect in the area of percentage depletion, perhaps the most generous business deduction in the Code. And Congress had the recipients of percentage depletion specifically in mind when it drafted § 1341. The House bill excluded

> Government as to the taxpayer. Congress may be strict or lavish in its allowance of deductions or tax benefits. The formula it writes may be arbitrary and harsh in its applications. But where the benefit claimed by the taxpayer is fairly within the statutory language and the construction sought is in harmony with the statute as an organic whole, the benefits will not be withheld from the taxpayer though they represent an unexpected windfall." *Lewyt Corp.* v. *Commissioner,* 349 U. S. 237, 240.

From any natural reading of § 1341, it is apparent that Congress believed the "deduction" in § 1341 (a)(2) would be in the amount of the "item" described in § 1341 (a)(1). If that understanding is not manifest from the face of the statute and the legislative history,[3] it is the unavoidable inference from a study of the pre-1954 law which

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from the coverage of § 1341 all refunds relating to inventory sales. The Senate Committee promptly removed refunds by regulated utilities from this exclusion with the following remarks:

"Your committee's bill provides that the exclusion of refunds pertaining to inventory sales will not exclude from the benefits of this section refunds made by a regulated public utility where the refunds are required to be made by the regulatory body, such as the Federal Power Commission. It is made clear, for example, that refunds of charges for the sale of natural gas under rates approved temporarily would be eligible for the benefits of this section." S. Rep. No. 1622, 83d Cong., 2d Sess., 118 (1954).

[3] The House and Senate Reports give no indication that Congress thought the deduction would be other than the amount of the item included in gross income for the prior year. They refer to the amount of the deduction and of the item interchangeably.

"If the taxpayer included an item in gross income in one taxable year, and in a subsequent taxable year he becomes entitled to a deduction because the item or a portion thereof is no longer subject to his unrestricted use, and the amount of the deduction is in excess of $3,000, the tax for the subsequent year is reduced by either the tax attributable to the deduction or the decrease in the tax for the prior year attributable to the removal of the item, whichever is the Court concedes § 1341 (a)(4) was intended to codify. In every case in this area previously decided by the Court the amount deductible in the year of repayment was considered to be exactly the same as the amount of the previously included item. In two of the cases most sharply in congressional focus in 1954, the Government had conceded without hesitation that the taxpayers were "entitled to a deduction for a loss in the year of repayment of the amount earlier included in income." *Healy* v. *Commissioner*, 345 U. S. 278, 284. See also *United States* v. *Lewis*, 340 U. S. 590, 591. That has been the express position of the Treasury since at least 1936,[4] and the Court today has not cited a single instance of deviation from that understanding.

The Court says that § 1341 is not alone controlling and that "it is necessary to refer to other portions of the Code to discover how much of a deduction is allow-

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greater. Under the rule of the *Lewis* case (340 U. S. 590 (1951)), the taxpayer is entitled to a deduction only in the year of repayment.

"In the case of a cash-basis taxpayer, in order to be entitled to a deduction in the later year, the amount must be repaid. However, in the case of an accrual-basis taxpayer, if the item was accrued but never received, the section applies when the deduction accrues in the later year although there is, of course, no amount to be repaid." S. Rep. No. 1622, *supra*, n. 2, at 451.

See also H. R. Rep. No. 1337, 83d Cong., 2d Sess., A294 (1954).

[4] See G. C. M. 16730, XV-1 Cum. Bull. 179, 181 (1936):

"In the instant case the taxpayer received the income under a claim of right and without restriction as to its disposition. On authority of the cases cited herein, this office is of the opinion that the profits in question should not be eliminated from the taxpayer's gross income for the years 1928 and 1929 [the years of inclusion], *but that the taxpayer is entitled to a deduction, for the year in which paid, of the amount of the profits paid . . . .*" (Emphasis supplied.)

See also 2 J. Mertens, Law of Federal Income Taxation § 12.106a, p. 431 (P. Zimet & J. Stanley rev. ed. 1967).

able." *Ante,* at 683. I agree that § 1341 must be considered in the context of the Internal Revenue Code as an "organic whole." But no other provisions of the Code in any manner bolster the Court's argument. The Court assumes, quite correctly, that either § 162 or § 165 does permit a deduction for the refund. But it does not, and cannot, suggest that either of those sections—or any other statutory provision—limits the amount of the deduction for the undeniable loss of profits in the full amount of the repayment. Instead the Court assumes a broad equitable authority to weed out tax benefits which it calls "double deductions"—a characterization wholly inapposite to the facts of this case.

In prior decisions disallowing what truly were "double deductions," the Court has relied on evident statutory indications, not just its own view of the equities, that Congress intended to preclude the second deduction. In those cases the taxpayers sought to benefit twice from the same statutory deduction.[5] In this case, by contrast, the respondent has taken two different deductions accorded by Congress for distinct purposes. In the years 1952 through 1957 it deducted the proper amounts for depletion—a deduction which is allowed by Congress "on the theory that the extraction of minerals gradually exhausts the capital investment in the mineral deposit," and which is "designed to permit a recoupment of the owner's capital investment in the minerals so that when the minerals are exhausted, the owner's capital is unimpaired." *Commissioner* v. *Southwest Exploration Co.*, 350 U. S. 308, 312. The respondent's 1958 deduction was granted by Congress for the entirely different reason that the refund of previously reported income constituted a loss, or business expense. In purpose and effect the deductions are wholly unrelated, and each is sustainable on its own merits. Certainly it cannot be said either that the respondent did not in fact exhaust the capital assets for which the deductions were allowed in 1952 through 1957 or that it did not suffer a business loss by the 1958 repayment.

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[5] *Charles Ilfeld Co.* v. *Hernandez,* 292 U. S. 62, and *United States* v. *Ludey,* 274 U. S. 295, both involved situations in which the taxpayer tried to take the same deduction twice. In *Ilfeld* the taxpayer had taken deductions, through consolidated returns, for the annual losses of its subsidiaries; when the subsidiaries' assets were sold and the companies dissolved, the parent taxpayer sought to take deductions for losses of its investment in the subsidiaries. As the Court held, "[t]he allowance claimed would permit [the parent] twice to use the subsidiaries' losses for the reduction of its taxable income," a double deduction that "nothing in the Act . . . purports to authorize . . . ." 292 U. S., at 68. In *Ludey* the taxpayer had taken deductions for depletion of his mining properties; but when the properties were sold in the taxable year in question, the taxpayer did not, in computing the gain from the sale, adjust the basis of the property to reflect the depletion deductions. The Court held that depletion allowances, like those for depreciation, are granted in recognition of the fact that the asset is disappearing year by year. When it is disposed of, therefore, "the thing then sold is not the whole thing originally acquired. The amount of the depreciation

The sole nexus between these distinct transactions on which the Court constructs its "double deduction" theory is that the depletion deductions were computed as a percentage of gross income from the property. But this fact cannot distinguish percentage depletion from any other deduction. If the respondent had elected to take cost depletion in 1952 through 1957, for example, there would also have been a portion of the gross income in those years—perhaps less than 27½%, perhaps more—which was not included in taxable income. Whether a deduction is computed as a fixed percentage of income or

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must be deducted from the original cost of the whole in order to determine the cost of that disposed of in the final sale of properties. Any other construction would permit a double deduction for the loss of the same capital assets." 274 U. S., at 301.

in some other manner, it always reduces by some percentage the income which is ultimately taxed. There are other deductions, of course, whose amount is a function of a certain percentage of the taxpayer's income. With respect to the individual taxpayer, the standard 10% deduction, § 141, and those for charitable contributions, § 170, and medical expenses, § 213, are doubtless the most frequent. Under the Court's ruling today, any taxpayer who repays money included in gross income in a prior year in which he also took one of the above mentioned deductions will have to reduce his refund deduction by that portion of the previous year's deduction attributable to the included income. Surely this result contravenes the purpose of the annual accounting concept to prevent recomputations of the prior year's tax.

The Court says today that there can be no deduction "for refunding money that was not taxed when received." *Ante,* at 685. This means nothing less than that, whenever a taxpayer seeks to deduct a refund of money received as income under a claim of right in a prior year, the deduction must be reduced by the percentage of gross income in that prior year which, for whatever reason, was not also taxable income. Otherwise there will be precisely the same kind of so-called "double deduction" as the Court finds in this case.

It is clear that the Court has wrought a major transformation of the deduction which has heretofore been allowed and which Congress recognized in § 1341 (a)(4). That deduction is permitted because, in the words of § 1341, the item "was included in *gross* income for a prior taxable year" (emphasis added), not because it was included in *taxable* income. It is no answer to say that the "annual accounting concept does not require us to close our eyes to what happened in prior years."

Ante, at 684. Of course we must look to the prior years to ascertain the amounts included in gross income and the nature of that income as it bears on the provision under which it is deductible in the year of repayment. *Arrowsmith* v. *Commissioner,* 344 U. S. 6.[6] But the very purpose of the annual accounting concept is to preclude adjustments in the amount of the deduction to reflect the tax consequences of the item's inclusion in the prior year.

> "Congress has enacted an annual accounting system under which income is counted up at the end of each year. It would be disruptive of an orderly collection of the revenue to rule that the accounting must be done over again to reflect events occurring after the year for which the accounting is made, and would violate the spirit of the annual accounting system. This basic principle cannot be changed simply because it is of advantage to a taxpayer or to the Government in a particular case that a different rule be followed." *Healy* v. *Commissioner,* 345 U. S. 278, 284–285.

One of the major factors, in addition to changes in tax rates and brackets, that determine who will benefit from adherence to the annual accounting principles embodied in § 1341 (a)(4) is the extent to which the taxpayer had deductions in the prior or subsequent taxable years to offset gross income. And it is no less inconsistent with annual accounting principles to pare down the allowable loss deduction in the year of repayment because of other deductions in the year of inclusion than because of a lower tax rate or bracket in that year.

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[6] As the Court recognizes, *ante,* at 685, n. 4, the Court in *Arrowsmith* did not hold that the amount of the deduction in the year of repayment would be reduced because in the year of inclusion the money had been taxed at a lower rate or had been offset by deductions. It held merely that the losses fell within the definition of "capital losses" contained in the sections authorizing deductions for the repayment. The Court does not in this case point to any comparable statutory provision affecting the nature or amount of the deduction for the refund.

Because I cannot agree that the Court's equitable sensibilities empower it to depart from the sound principles of tax accounting specifically endorsed by Congress in § 1341, I respectfully dissent.

NORFOLK MONUMENT CO., INC. *v.* WOODLAWN MEMORIAL GARDENS, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 1040. Decided April 21, 1969.

Petitioner, a retailer of burial monuments and bronze grave markers, brought suit for damages and injunctive relief under §§ 4 and 16 of the Clayton Act, alleging that respondents had violated §§ 1 and 2 of the Sherman Act by conspiring to monopolize and monopolizing the manufacture and sale of bronze grave markers. After extensive pretrial discovery respondents' motion for summary judgment was granted, the District Court concluding that there was no material issue of fact and no evidence of conspiracy. The Court of Appeals affirmed. *Held:* The alleged conspiracy had not been conclusively disproved by pretrial discovery and there remained material issues of fact which could only be resolved by a jury after a plenary trial. "[S]ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles . . . ." *Poller* v. *Columbia Broadcasting System,* 368 U. S. 464, 473.

Certiorari granted; 404 F. 2d 1008, reversed.

Howard I. Legum and *Louis B. Fine* for petitioner.

Frederick S. Albrink for Woodlawn Memorial Gardens, Inc., *William C. Worthington* for Rosewood Memorial Park, Inc., et al., *Jefferson B. Brown* for Greenlawn Cemetery Park Corp., *Bernard Glasser* and *Stuart D. Glasser* for Roosevelt Memorial Park & Cemetery Corp., and *William H. King* for Jas. H. Matthews & Co. of Virginia et al., respondents.

PER CURIAM.

The petitioner, a retailer of burial monuments and bronze grave markers, brought this action for damages and injunctive relief under §§ 4 and 16 of the Clayton Act, 38 Stat. 731, 737, as amended, 15 U. S. C. §§ 15, 26, alleging that the respondents had violated §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2, by conspiring to monopolize and monopolizing the manufacture and sale of bronze grave markers. The respondents—Matthews, a manufacturer of such markers, and five operators of cemeteries (called "memorial parks") that sell the markers—were charged with having jointly adopted various restrictive devices to prevent, restrict, and discourage sales of markers by the petitioner for installation in the cemeteries. After extensive pretrial discovery, the District Court granted the respondents' motion for summary judgment, concluding that there was no material issue of fact and no evidence of conspiracy. 290 F. Supp. 1. The Court of Appeals affirmed. 404 F. 2d 1008.

We cannot agree that on the record before the District Court a jury could not have found that the respondents had conspired to exclude the petitioner from and monopolize the market for bronze grave markers. As Circuit Judge Craven pointed out in his dissenting opinion, the record disclosed the following conduct on the part of the respondents:

> "(1) Despite the unskilled nature of the work, all of the memorial parks refuse to permit the plaintiff to install markers sold by it; all of them insist that the work be done by the cemeteries themselves.
>
> "(2) None of the memorial parks charges lot owners a separate installation fee in the case of markers purchased from the cemeteries.
>
> "(3) All of the memorial parks require the payment of an installation fee by the plaintiff for installing markers purchased from the plaintiff. The plaintiff plausibly maintains that the actual cost of installation comes to about $3. Yet, enormous installation fees are charged plaintiff . . . .

> "(4) All of the memorial parks require a specific alloy content in the bronze markers installed, and reserve the right to reject non-conforming markers. The alloy content requirement happens to be the same as manufacturer Matthews' markers and the same as is implicitly suggested in a pamphlet ('Modern Cemeteries') distributed by Matthews to its customers. All of the memorial parks except Roosevelt are customers of Matthews.
>
> "(5) There is evidence that Greenlawn, Woodlawn and Princess Anne have attempted to dissuade lot owners from purchasing markers from the plaintiff. The affidavit of plaintiff's president states that numerous other incidents of this nature have occurred.
>
> "(6) Defendant Matthews, in its pamphlet 'Modern Cemeteries,' suggests a number of practices which in effect erect competitive barriers to retailers other than the cemeteries themselves.
>
> "(7) Many of these practices have been adopted by the memorial park defendants, as evidenced by affidavits in the record, and by the 'rule books' of Rosewood, Princess Anne and Greenlawn.
>
> "(8) There is evidence of numerous visits to and conferences with the memorial parks by sales representatives of Matthews." 404 F. 2d, at 1012–1014.

The District Court found that the rules relating to the alloy content and installation of the markers were reasonable "[i]n view of the continuing obligation of perpetual care imposed upon the cemeteries, in [their] contracts with lot owners . . . ." 290 F. Supp., at 3. But the business justification for these restrictive rules was disputed by the petitioner, which proffered evidence that the markers required very little permanent care and that, in any event, the funds for that purpose were already provided from another source. The reasonableness of the rules was a material question of fact whose resolution was the function of the jury and not of the court on a motion for summary judgment. The same is true of the inferences to be drawn from respondent Matthews' pamphlet. The District Court dismissed it as without any possible significance because it was a mere "form book," which "specifically points out . . . that it contains suggested standards of fair and reasonable regulations which the cemetery would be advised to adopt but says that '. . . Jas. H. Matthews & Co. is not permitted to make recommendations and suggests that the reader consult his own attorney.' "* 290 F. Supp., at 3. Again this self-serving disclaimer raised a question for the jury, and it surely did not alone conclusively rebut the petitioner's contention that the pamphlet evidenced an agreement among the respondents to participate in the alleged restrictive practices.

Nor do the other findings of the District Court necessarily dispel the inferences which the jury would be asked by the petitioner to draw. The District Court found, for example, that there was "a wide divergence of prices" charged for installation "which would completely negative any systematic scheming or conscious parallelism." 290 F. Supp., at 3. The petitioner's complaint, however, was not that the respondent cemeteries were charging uniform fees but that they were charging deliberately "excessive and unreasonable" fees for the purpose of injuring the petitioner. The fact that the District Court appeared to consider dispositive of the conspiracy allegations was that the petitioner's principal officer "admitted that he has no letters, agreements, correspondence, or any other testimonials to a conspiracy among the several defendants . . . ." 290 F. Supp., at 3. But it is settled that "[n]o formal agreement is necessary to constitute an unlawful conspiracy," *American Tobacco Co.* v. *United States,* 328 U. S. 781, 809, and that "business behavior is admissible circumstantial evidence from which the fact finder may infer agreement." *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.,* 346 U. S. 537, 540.

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*Judge Craven noted that the reason for the disclaimer is that "Matthews is under an injunction prohibiting it from making any suggestions to memorial parks as to the quality of markers installed in the parks." 404 F. 2d, at 1013, n. 6. The injunction was entered in one of the three consent decrees which have settled prior antitrust actions against Matthews. See 404 F. 2d, at 1014.

We express no opinion, of course, on the strength or weakness of the petitioner's case, but hold only that the alleged conspiracy had not been conclusively disproved by pretrial discovery and that there remained material issues of fact which could only be resolved by the jury after a plenary trial. As we have cautioned before, "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller* v. *Columbia Broadcasting System,* 368 U. S. 464, 473.

The writ of certiorari is granted. The judgment is reversed, and the case is remanded for further proceedings in the District Court consistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN, MR. JUSTICE FORTAS, and MR. JUSTICE MARSHALL are of the opinion that certiorari should be denied.

WATTS *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 1107, Misc. Decided April 21, 1969.

Petitioner's remark during political debate at small public gathering that if inducted into Army (which he vowed would never occur) and made to carry a rifle "the first man I want to get in my sights is L. B. J.," *held* to be crude political hyperbole which in light of its context and conditional nature did not constitute a knowing and willful threat against the President within the coverage of 18 U. S. C. § 871 (a).

Certiorari granted; 131 U. S. App. D. C. 125, 402 F. 2d 676, reversed and remanded.

Joseph Forer for petitioner.

Solicitor General Griswold for the United States.

Ralph J. Temple, *Melvin L. Wulf*, and *Lawrence Speiser* for the American Civil Liberties Union et al. as *amici curiae.*

PER CURIAM.

After a jury trial in the United States District Court for the District of Columbia, petitioner was convicted of violating a 1917 statute which prohibits any person from "knowingly and willfully . . . [making] any threat to take the life of or to inflict bodily harm upon the President of the United States . . . ."[*] The incident

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[*] 18 U. S. C. § 871 (a) provides:

"Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office which led to petitioner's arrest occurred on August 27, 1966, during a public rally on the Washington Monument grounds. The crowd present broke up into small discussion groups and petitioner joined a gathering scheduled to discuss police brutality. Most of those in the group were quite young, either in their teens or early twenties. Petitioner, who himself was 18 years old, entered into the discussion after one member of the group suggested that the young people present should get more education before expressing their views. According to an investigator for the Army Counter Intelligence Corps who was present, petitioner responded: "They always holler at us to get an education. And now I have already received my draft classification as 1–A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L. B. J." "They are not going to make me kill my black brothers." On the basis of this statement, the jury found that petitioner had committed a felony by knowingly and willfully threatening the President. The United States Court of Appeals for the District of Columbia Circuit affirmed by a two-to-one vote. 131 U. S. App. D. C. 125, 402 F. 2d 676 (1968). We reverse.

At the close of the Government's case, petitioner's trial counsel moved for a judgment of acquittal. He contended that there was "absolutely no evidence on the basis of which the jury would be entitled to find that [petitioner] made a threat against the life of the Presi-

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of President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

dent." He stressed the fact that petitioner's statement was made during a political debate, that it was expressly made conditional upon an event—induction into the Armed Forces—which petitioner vowed would never occur, and that both petitioner and the crowd laughed after the statement was made. He concluded, "Now actually what happened here in all this was a kind of very crude offensive method of stating a political opposition to the President. What he was saying, he says, I don't want to shoot black people because I don't consider them my enemy, and if they put a rifle in my hand it is the people that put the rifle in my hand, as symbolized by the President, who are my real enemy." We hold that the trial judge erred in denying this motion.

Certainly the statute under which petitioner was convicted is constitutional on its face. The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence. See H. R. Rep. No. 652, 64th Cong., 1st Sess. (1916). Nevertheless, a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.

The judges in the Court of Appeals differed over whether or not the "willfullness" requirement of the statute implied that a defendant must have intended to carry out his "threat." Some early cases found the willfullness requirement met if the speaker voluntarily uttered the charged words with "an *apparent* determination to carry them into execution." *Ragansky* v. *United States*, 253 F. 643, 645 (C. A. 7th Cir. 1918) (emphasis supplied); cf. *Pierce* v. *United States*, 365 F. 2d 292 (C. A.

10th Cir. 1966). The majority below seemed to agree. Perhaps this interpretation is correct, although we have grave doubts about it. See the dissenting opinion below, 131 U. S. App. D. C., at 135–142, 402 F. 2d, at 686–693 (Wright, J.). But whatever the "willfullness" requirement implies, the statute initially requires the Government to prove a true "threat." We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term. For we must interpret the language Congress chose "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270 (1964). The language of the political arena, like the language used in labor disputes, see *Linn* v. *United Plant Guard Workers of America,* 383 U. S. 53, 58 (1966), is often vituperative, abusive, and inexact. We agree with petitioner that his only offense here was "a kind of very crude offensive method of stating a political opposition to the President." Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted and the judgment of the Court of Appeals is reversed. The case is remanded with instructions that it be returned to the District Court for entry of a judgment of acquittal.

It is so ordered.

MR. JUSTICE STEWART would deny the petition for certiorari.

MR. JUSTICE WHITE dissents.

MR. JUSTICE DOUGLAS, concurring.

The charge in this case is of an ancient vintage.

The federal statute under which petitioner was convicted traces its ancestry to the Statute of Treasons (25 Edw. 3) which made it a crime to "compass or imagine the Death of . . . the King." Note, Threats to Take the Life of the President, 32 Harv. L. Rev. 724, 725 (1919). It is said that one Walter Walker, a 15th century keeper of an inn known as the "Crown," was convicted under the Statute of Treasons for telling his son: "Tom, if thou behavest thyself well, I will make thee heir to the CROWN." He was found guilty of compassing and imagining the death of the King, hanged, drawn, and quartered. 1 J. Campbell, Lives of the Chief Justices of England 151 (1873).

In the time of Edward IV, one Thomas Burdet who predicted that the king would "soon die, with a view to alienate the affections" of the people was indicted for "compassing and imagining of the death of the King," 79 Eng. Rep. 706 (1477)—the crime of constructive treason[1] with which the old reports are filled.

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[1] The prosecution in those cases laid bare to the juries that the treasonous thoughts were the heart of the matter; "the original of his Treasons proceeded from the imagination of his heart; which imagination was in itself High-Treason, albeit the same proceeded not to any overt fact: and the heart being possessed with the abundance of his traitorous imagination, and not being able so to contain itself, burst forth in vile and traitorous Speeches, and from thence to horrible and heinous actions." *Trial of Sir John Perrot,* 1 How. St. Tr. 1315, 1318 (1592). "[T]he high treason charged, is the compassing or imagining (in other words, the intending or designing) the death of the king; I mean his NATURAL DEATH; which being a hidden operation of the mind, an overt act is any thing which legally proves the existence of such traitorous design and intention—I say that the design against the king's natural life, is the high treason under the first branch of the statute; and whatever is evidence, which may be legally laid before a jury to judge of the traitorous intention, is a legal overt act; because an overt act is

In the time of Charles II, one Edward Brownlow was indicted "for speaking these words, that he wished all the gentry in the land would kill one another, so that the comminalty might live the better." 3 Middlesex County Rec. 326 (1888). In the same year (1662) one Robert Thornell was indicted for saying "that if the Kinge did side with the Bishops, the divell take Kinge and the Bishops too." *Id.,* at 327.

While our Alien and Sedition Laws were in force, John Adams, President of the United States, en route from Philadelphia, Pennsylvania, to Quincy, Massachusetts, stopped in Newark, New Jersey, where he was greeted by a crowd and by a committee that saluted him by firing a cannon.

A bystander said, "There goes the President and they are firing at his ass." Luther Baldwin was indicted for replying that he did not care "if they fired through his ass." He was convicted in the federal court for speaking "sedicious words tending to defame the President and Government of the United States" and fined, assessed court costs and expenses, and committed to jail until the fine and fees were paid. See J. Smith, Freedom's Fetters 270–274 (1956).

The Alien and Sedition Laws constituted one of our sorriest chapters; and I had thought we had done with them forever.[2]

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nothing but legal evidence embodied upon the record." *Trial of Thomas Hardy,* 24 How. St. Tr. 199, 894 (1794). And see 84 Eng. Rep. 1057 (1708).

For a discussion of the adequacy of mere words as overt acts see 3 W. Holdsworth, History of English Law 293 (1927).

[2] "In the Sedition Act cases, the tendency of words to produce acts against the peace and security of the community was stretched to its utmost latitude. Likewise, judges and juries, in their willingness to presume evil intent on the part of Republican writers, largely nullified the safeguards erected by the Sedition Act itself. Criticism of the President and Congress—in which every American indulges as his birthright—was severely punished; yet this practice

Yet the present statute has hardly fared better. "Like the Statute of Treasons, section 871 was passed in a 'relatively calm peacetime spring,' but has been construed under circumstances when intolerance for free speech was much greater than it normally might be." Note, Threatening the President: Protected Dissenter or Political Assassin, 57 Geo. L. J. 553, 570 (1969). Convictions under 18 U. S. C. § 871 have been sustained for displaying posters urging passersby to "hang [President] Roosevelt." *United States* v. *Apel,* 44 F. Supp. 592, 593 (D. C. N. D. Ill. 1942); for declaring that "President Wilson ought to be killed. It is a wonder some one has not done it already. If I had an opportunity, I would do it myself." *United States* v. *Stickrath,* 242 F. 151, 152 (D. C. S. D. Ohio 1917); for declaring that "Wilson is a wooden-headed son of a bitch. I wish Wilson was in hell, and if I had the power I would put him there," *Clark* v. *United States,* 250 F. 449 (C. A. 5th Cir. 1918). In sustaining an indictment under the statute against a man who indicated that he would enjoy shooting President Wilson if he had the chance, the trial court explained the thrust of § 871:

> "The purpose of the statute was undoubtedly, not only the protection of the President, but also the prohibition of just such statements as those alleged in this indictment. The expression of such direful intentions and desires, not only indicates a spirit of disloyalty to the nation bordering upon treason, but is, in a very real sense, a menace to the peace and safety of the country. . . . It arouses resentment

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manifestly has only a remote tendency to injure and bring into contempt the government of the United States. In short, much that has become commonplace in American political life was put under the ban by the Federalist lawmakers and judges of 1798." J. Miller, Crisis in Freedom 233 (1951).

> and concern on the part of patriotic citizens." *United States* v. *Jasick,* 252 F. 931, 933 (D. C. E. D. Mich. 1918).

Suppression of speech as an effective police measure is an old, old device, outlawed by our Constitution.

MR. JUSTICE FORTAS, with whom MR. JUSTICE HARLAN joins, dissenting.

The Court holds, without hearing, that this statute is constitutional and that it is here wrongly applied. Neither of these rulings should be made without hearing, even if we assume that they are correct.

Perhaps this is a trivial case because of its peculiar facts and because the petitioner was merely given a suspended sentence. That does not justify the Court's action. It should induce us to deny certiorari, not to decide the case on its merits and to adjudicate the difficult questions that it presents.

EMANUEL, EXECUTOR, ET AL. *v.* CHAPPLE, EXECUTOR.

APPEAL FROM THE COURT OF APPEAL OF LOUISIANA, SECOND CIRCUIT.

No. 1092. Decided April 21, 1969.

210 So. 2d 602, appeal dismissed and certiorari denied.

James Sharp, Jr., for appellants.

Howell H. Heard for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

EMANUEL, EXECUTOR, ET AL. *v.* CHAPPLE, EXECUTOR.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 1125. Decided April 21, 1969.

Appeal dismissed and certiorari denied.

James Sharp, Jr., for appellants.

Howell H. Heard for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

CONTINENTAL CASUALTY CO. ET AL. *v.* ROBERTSON LUMBER CO.

APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA.

No. 582. Decided April 21, 1969.

160 N. W. 2d 61, appeal dismissed and certiorari denied.

Kahl K. Spriggs and *James L. Lamb* for appellants.

Harold D. Shaft for appellee.

Solicitor General Griswold, at the invitation of the Court, filed a memorandum for the United States.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

PENDERGRAFT *v.* MISSISSIPPI.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 834. Decided April 21, 1969.

213 So. 2d 560, appeal dismissed and certiorari denied.

W. S. Moore for appellant.

Joe T. Patterson, Attorney General of Mississippi, and *G. Garland Lyell, Jr.,* Assistant Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

OTTLEY ET AL. *v.* LONG ISLAND COLLEGE HOSPITAL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 1045. Decided April 21, 1969.

23 N. Y. 2d 20, 241 N. E. 2d 892, appeal dismissed.

Stephen C. Vladeck and *Judith P. Vladeck* for appellants.

Theodore R. Iserman and *Frederick T. Shea* for appellee.

Louis J. Lefkowitz, Attorney General of New York, *pro se, Samuel A. Hirshowitz,* First Assistant Attorney General, and *Maria L. Marcus* and *Amy Juviler,* Assistant Attorneys General, for the Attorney General of New York as *amicus curiae* in support of appellants.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a properly presented federal question.

CITY OF CHICAGO ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 1047. Decided April 21, 1969.*

291 F. Supp. 858, affirmed.

Raymond F. Simon, Nuel D. Belnap, and *Harold E. Spencer* for appellants in No. 1047. *John W. Adams, William J. O'Brien, Jr., James H. Durkin, Bryce L. Hamilton,* and *Louis A. Schwartz* for appellants in No. 1048.

Solicitor General Griswold, Assistant Attorney General McLaren, Robert W. Ginnane, Leonard S. Goodman, and *Raymond M. Zimmet* for the United States et al. in both cases.

Briefs of *amici curiae* were filed in No. 1047 by *William J. Scott,* Attorney General, and *Robert F. Scott,* Assistant Attorney General, for the State of Illinois; by *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Nicholas V. Olds, Jerome Maslowski,* and *Curtis G. Beck,* Assistant Attorneys General, for the State of Michigan; by *Paul W. Brown,* Attorney General, and *Shelby V. Hutchins* and *J. Philip Redick,* Assistant Attorneys General, for the State of Ohio; and by *Joseph H. Nathanson* for the Toledo-Lucas County Port Authority.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

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*Together with No. 1048, *Illinois Central Railroad Co. et al.* v. *City of Chicago et al.*, also on appeal from the same court.

ESTES EXPRESS LINES ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA.

No. 1121. Decided April 21, 1969.

292 F. Supp. 842, affirmed.

Harry J. Jordan for appellants.

Solicitor General Griswold, Assistant Attorney General McLaren, Robert W. Ginnane, and *Raymond M. Zimmet* for the United States et al., and *William H. Marx* and *H. Merrill Pasco* for Railway Express Agency, Inc., appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

CONSOLIDATED COPPERSTATE LINES *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

No. 1128. Decided April 21, 1969.*

293 F. Supp. 858, affirmed.

David Axelrod for appellant in No. 1128. *Dennis G. Lyons* and *Joe A. Keith* for appellant in No. 1141.

Solicitor General Griswold, Assistant Attorney General McLaren, Robert W. Ginnane, Nahum Litt, and *Jerome Nelson* for the United States et al., *T. S. Christopher* for appellee Braswell Motor Freight Lines, Inc., and *Carl L. Phinney* for appellee Herrin Transportation Co. in both cases. *Phillip Robinson* for appellees Central Freight Lines, Inc., et al., and *Reagan Sayers* for appellee Ryder Truck Lines, Inc., in No. 1128. *Robert E. Joyner, Phineas Stevens,* and *Charles D. Mathews* for appellees Arkansas-Best Freight System, Inc., et al. in No. 1141.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE FORTAS took no part in the consideration or decision of these cases.

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*Together with No. 1141, *Strickland Transportation Co., Inc.* v. *United States et al.*, also on appeal from the same court.

JONES *v.* FLORIDA.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

No. 807, Misc. Decided April 21, 1969.

Certiorari granted; 205 So. 2d 675, vacated and remanded.

Phillip A. Hubbart for petitioner.

Earl Faircloth, Attorney General of Florida, and *Harold Mendelow,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the District Court of Appeal of Florida, Third District, for further consideration in light of *Bruton* v. *United States,* 391 U. S. 123, and *Roberts* v. *Russell,* 392 U. S. 293.

DAVIS *v.* MISSISSIPPI.

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI.

No. 645. Argued February 26–27, 1969.—
Decided April 22, 1969.

In connection with a rape investigation the Meridian, Mississippi, police, without warrants, brought numerous Negro youths to the police station for questioning and fingerprinting. Petitioner was thus questioned and fingerprinted, and released. Thereafter, concededly without a warrant or probable cause for arrest, the police drove petitioner to Jackson and confined him in jail overnight. After he was questioned and signed a statement, he was returned to Meridian and jailed. While so confined he was again fingerprinted and these prints were sent to the FBI for comparison with latent prints found in the victim's home. The fingerprint evidence was admitted at petitioner's trial for rape, over objection that it was the product of unlawful detention, and he was convicted. The Mississippi Supreme Court upheld the conviction. *Held:*

1. Fingerprint evidence is no exception to the rule that all evidence obtained by searches and seizures in violation of the Constitution is inadmissible in a state court. Pp. 723–724.

2. The Fourth Amendment applies to involuntary detention occurring at the investigatory stage as well as at the accusatory stage. Pp. 726–727.

3. Detentions for the sole purpose of obtaining fingerprints are subject to the constraints of the Fourth Amendment. P. 727.

4. It is not determined here whether Fourth Amendment requirements could be met by narrowly circumscribed procedures for obtaining, during a criminal investigation, fingerprints of persons for whom there is no probable cause to arrest, since no attempt was made in this case to employ procedures which might comply with the Fourth Amendment. P. 728.

204 So. 2d 270, reversed.

Melvyn Zarr argued the cause for petitioner. With him on the brief were *Jack Greenberg, Michael Meltsner, Anthony G. Amsterdam,* and *Jack Young.*

G. Garland Lyell, Jr., Assistant Attorney General of Mississippi, argued the cause for respondent. With him on the brief was *Joe T. Patterson,* Attorney General.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner was convicted of rape and sentenced to life imprisonment by a jury in the Circuit Court of Lauderdale County, Mississippi. The only issue before us is whether fingerprints obtained from petitioner should have been excluded from evidence as the product of a detention which was illegal under the Fourth and Fourteenth Amendments.

The rape occurred on the evening of December 2, 1965, at the victim's home in Meridian, Mississippi. The victim could give no better description of her assailant than that he was a Negro youth. Finger and palm prints found on the sill and borders of the window through which the assailant apparently entered the victim's home constituted the only other lead available at the outset of the police investigation. Beginning on December 3, and for a period of about 10 days, the Meridian police, without warrants, took at least 24 Negro youths to police headquarters where they were questioned briefly, fingerprinted, and then released without charge. The police also interrogated 40 or 50 other Negro youths either at police headquarters, at school, or on the street. Petitioner, a 14-year-old youth who had occasionally worked for the victim as a yardboy, was brought in on December 3 and released after being fingerprinted and routinely questioned. Between December 3 and December 7, he was interrogated by the police on several occasions—sometimes in his home or in a car, other times at police headquarters. This questioning apparently related primarily to investigation of other potential suspects. Several times during this same period petitioner was exhibited to the victim in her hospital room. A police officer testified that these confrontations were for the purpose of sharpening the victim's description of her assailant by providing "a gauge to go by on size and color." The victim did not identify petitioner as her assailant at any of these confrontations.

On December 12, the police drove petitioner 90 miles to the city of Jackson and confined him overnight in the Jackson jail. The State conceded on oral argument in this Court that there was neither a warrant nor probable cause for this arrest. The next day, petitioner, who had not yet been afforded counsel, took a lie detector test and signed a statement.[1] He was then returned to and confined in the Meridian jail. On December 14, while so confined, petitioner was fingerprinted a second time. That same day, these December 14 prints, together with the fingerprints of 23 other Negro youths apparently still under suspicion, were sent to the Federal Bureau of Investigation in Washington, D. C., for comparison with the latent prints taken from the window of the victim's house. The FBI reported that petitioner's prints matched those taken from the window. Petitioner was subsequently indicted and tried for the rape, and the fingerprint evidence was admitted in evidence at trial over petitioner's timely objections that the fingerprints should be excluded as the product of an unlawful detention. The Mississippi Supreme Court sustained the admission of the fingerprint evidence and affirmed the conviction. 204 So. 2d 270 (1967). We granted certiorari. 393 U. S. 821 (1968). We reverse.

At the outset, we find no merit in the suggestion in the Mississippi Supreme Court's opinion that fingerprint evidence, because of its trustworthiness, is not subject to the proscriptions of the Fourth and Fourteenth

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[1] The statement was not introduced at the trial.

Amendments.[2] Our decisions recognize no exception to the rule that illegally seized evidence is inadmissible at trial, however relevant and trustworthy the seized evidence may be as an item of proof. The exclusionary rule was fashioned as a sanction to redress and deter overreaching governmental conduct prohibited by the Fourth Amendment. To make an exception for illegally seized evidence which is trustworthy would fatally undermine these purposes. Thus, in *Mapp* v. *Ohio,* 367 U. S. 643, 655 (1961), we held that "*all* evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." (Italics supplied.) Fingerprint evidence is no exception to this comprehensive rule. We agree with and adopt the conclusion of the Court of Appeals for the District of Columbia Circuit in *Bynum* v. *United States,* 104 U. S. App. D. C. 368, 370, 262 F. 2d 465, 467 (1958):

> "True, fingerprints can be distinguished from statements given during detention. They can also be distinguished from articles taken from a prisoner's possession. Both similarities and differences of each type of evidence to and from the others are apparent. But all three have the decisive common characteristic of being something of evidentiary value which the public authorities have caused an arrested person to yield to them during illegal detention. If one such product of illegal detention is proscribed, by the same token all should be proscribed."

We turn then to the question whether the detention of petitioner during which the fingerprints used at trial were taken constituted an unreasonable seizure of his person in violation of the Fourth Amendment. The opinion of the Mississippi Supreme Court proceeded on the mistaken premise that petitioner's prints introduced at trial were taken during his brief detention on December 3. In fact, as both parties before us agree, the fingerprint evidence used at trial was obtained on December 14, while petitioner was still in detention following his December 12 arrest. The legality of his arrest was not determined by the Mississippi Supreme Court. However, on oral argument here, the State conceded that the arrest on December 12 and the ensuing detention through December 14 were based on neither a warrant nor probable cause and were therefore constitutionally invalid. The State argues, nevertheless, that this invalidity should not prevent us from affirming petitioner's conviction. The December 3 prints were validly obtained, it is argued, and "it should make no difference in the practical or legal sense which [fingerprint] card was sent to the F. B. I. for comparison."[3] It may be that it does make a difference in light of the objectives of the exclusionary rule, see *Bynum* v. *United States, supra,* at 371–372, 262 F. 2d, at 468–469,[4] but we need not decide the question since we have concluded that the prints of December 3 were not validly obtained.

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[2] Fingerprint evidence would seem no more "trustworthy" than other types of evidence—such as guns, narcotics, gambling equipment—which are routinely excluded if illegally obtained.

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[3] Brief for Respondent 8.

[4] The Government argued in *Bynum* that the controversy over the introduction in evidence of a particular set of fingerprints was "much ado over very little," because another set properly taken was available and might have been used. The Court of Appeals rejected this argument: "It bears repeating that the matter of primary judicial concern in all cases of this type is the imposition of effective sanctions implementing the Fourth Amendment guarantee against illegal arrest and detention. Neither the fact that the evidence obtained through such detention is itself trustworthy or the fact that equivalent evidence can conveniently be obtained in a wholly proper way militates against this overriding

The State makes no claim that petitioner voluntarily accompanied the police officers to headquarters on December 3 and willingly submitted to fingerprinting. The State's brief also candidly admits that "[a]ll that the Meridian Police could possibly have known about petitioner at the time . . . would not amount to probable cause for his arrest . . . ."[5] The State argues, however, that the December 3 detention was of a type which does not require probable cause. Two rationales for this position are suggested. First, it is argued that the detention occurred during the investigatory rather than accusatory stage and thus was not a seizure requiring probable cause. The second and related argument is that, at the least, detention for the sole purpose of obtaining fingerprints does not require probable cause.

It is true that at the time of the December 3 detention the police had no intention of charging petitioner with the crime and were far from making him the primary focus of their investigation. But to argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions

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consideration. It is entirely irrelevant that it may be relatively easy for the government to prove guilt without using the product of illegal detention. The important thing is that those administering the criminal law understand that they must do it that way." 104 U. S. App. D. C., at 371–372, 262 F. 2d, at 468–469. On Bynum's retrial another set of fingerprints in no way connected with his unlawful arrest was used, and he was again convicted. The Court of Appeals affirmed this conviction. 107 U. S. App. D. C. 109, 274 F. 2d 767 (1960).

[5] Brief for Respondent 3.

be termed "arrests" or "investigatory detentions."[6] We made this explicit only last Term in *Terry* v. *Ohio,* 392 U. S. 1, 19 (1968), when we rejected "the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'"

Detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment. It is arguable, however, that, because of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense. See *Camara* v. *Municipal Court,* 387 U. S. 523 (1967). Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person's prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the "third degree." Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time.

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[6] The State relies on various statements in our cases which approve general questioning of citizens in the course of investigating a crime. See *Miranda* v. *Arizona,* 384 U. S. 436, 477–478 (1966); *Culombe* v. *Connecticut,* 367 U. S. 568, 635 (concurring opinion) (1961). But these statements merely reiterated the settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer.

For this same reason, the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context.

We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest. For it is clear that no attempt was made here to employ procedures which might comply with the requirements of the Fourth Amendment: the detention at police headquarters of petitioner and the other young Negroes was not authorized by a judicial officer; petitioner was unnecessarily required to undergo two fingerprinting sessions; and petitioner was not merely fingerprinted during the December 3 detention but also subjected to interrogation. The judgment of the Mississippi Supreme Court is therefore

Reversed.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN, concurring.

I join the opinion of the Court, with one reservation. The Court states in dictum that, because fingerprinting may be scheduled for a time convenient to the citizen, "the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context." *Ante,* this page. I cannot concur in so sweeping a proposition. There may be circumstances, falling short of the "dragnet" procedures employed in this case, where compelled submission to fingerprinting would not amount to a violation of the Fourth Amendment even in the absence of a warrant, and I would leave that question open.

MR. JUSTICE BLACK, dissenting.

The petitioner here was convicted of a brutal rape of a woman, committed in her own home. Fingerprints of the petitioner, left on the window sill of her home, were the clinching evidence bringing about petitioner's conviction. The Court, by once more expanding the reach of the judicially declared exclusionary rule, ostensibly resting on the Fourth Amendment, holds the fingerprint evidence constitutionally inadmissible and thereby reverses petitioner's conviction. The rape occurred on December 2, 1965, and, as was their duty, the police authorities began to make a searching investigation the morning of December 3. The raped woman was originally able to describe the rapist only as a young Negro male. With this evidence the police proceeded to interrogate a number of young Negroes on the streets, at their homes, or at the police station, and then permitted them to go on their way. The petitioner was among those so interrogated on December 3, at which time his fingerprints were made. The fingerprints were again taken on December 14. The record does not show that petitioner or any other young man who was questioned and fingerprinted ever made the slightest objection. Apparently all of them cooperated with the police in efforts to find out who had committed the rape. This case is but one more in an ever-expanding list of cases in which this Court has been so widely blowing up the Fourth Amendment's scope that its original authors would be hard put to recognize their creation.* For this most

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*See, *e. g., Bumper* v. *North Carolina,* 391 U. S. 543—another rape case; *Spinelli* v. *United States,* 393 U. S. 410; *Aguilar* v. *Texas,* 378 U. S. 108; *Recznik* v. *City of Lorain,* 393 U. S. 166; and *Griswold* v. *Connecticut,* 381 U. S. 479.

unnecessary expansion of the Amendment, the Court is compelled to put its chief reliance on a Court of Appeals decision, *Bynum* v. *United States*, 104 U. S. App. D. C. 368, 262 F. 2d 465. I think it is high time this Court, in the interest of the administration of criminal justice, made a new appraisal of the language and history of the Fourth Amendment and cut it down to its intended size. Such a judicial action would, I believe, make our cities a safer place for men, women, and children to live.

I dissent from this reversal.

MR. JUSTICE STEWART, dissenting.

I do not disagree with the Court's conclusion that the petitioner was arrested and detained without probable cause. But it does not follow that his fingerprints were inadmissible at the trial.

Fingerprints are not "evidence" in the conventional sense that weapons or stolen goods might be. Like the color of a man's eyes, his height, or his very physiognomy, the tips of his fingers are an inherent and unchanging characteristic of the man. And physical impressions of his fingertips can be exactly and endlessly reproduced.

We do not deal here with a confession wrongfully obtained or with property wrongfully seized—so tainted as to be forever inadmissible as evidence against a defendant. We deal, instead, with "evidence" that can be identically reproduced and lawfully used at any subsequent trial.*

I cannot believe that the doctrine of *Mapp* v. *Ohio*, 367 U. S. 643, requires so useless a gesture as the reversal of this conviction.

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*At the original trial the victim of the rape, under oath, positively identified the petitioner as her assailant. There now exists, therefore, ample probable cause to detain him and take his fingerprints.

FRAZIER *v.* CUPP, WARDEN.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 643. Argued February 26, 1969.—Decided April 22, 1969.

Petitioner in this habeas corpus proceeding claims that his constitutional rights were violated in three respects in his trial in 1965 for murder for which he had been indicted jointly with one Rawls, who pleaded guilty. (1) The prosecutor, on the basis of previous information he had received that Rawls would testify, included in his opening statement a brief summary of Rawls' expected testimony. When Rawls was called to the stand he claimed his privilege against self-incrimination and was dismissed. Petitioner's motions for a mistrial were overruled. The trial court instructed the jury that the opening statements of counsel should not be considered as evidence. (2) After preliminary questioning shortly after his arrest petitioner was told that he could have an attorney if he wanted one and that anything he said could be used against him at trial. Thereafter the interrogating officer falsely told petitioner, who was reluctant to talk, that Rawls had confessed. Petitioner later began to spill his story, but again showed signs of reluctance and said he thought he better get a lawyer before he talked any more. Following the officer's reply that petitioner could not be in any more trouble than he was in, petitioner fully confessed and after further warnings signed a written confession, which was later admitted into evidence over petitioner's objection. (3) Also admitted into evidence was some clothing which officers had seized from petitioner's duffel bag which he and Rawls had used jointly and which the officers had found during a search conducted with Rawls' consent. Petitioner was convicted and the State Supreme Court affirmed. Petitioner thereafter filed a petition for a writ of habeas corpus in the District Court, which granted the writ. The Court of Appeals reversed. Petitioner claims that the prosecutor's use of the summarized Rawls statement denied him his constitutional rights of confrontation as guaranteed by the Sixth and Fourteenth Amendments; that his confession contravened the principles established by *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), and *Miranda* v. *Arizona,* 384 U. S. 436 (1966), and was involuntary; and that the clothing had been illegally seized in violation of the Fourth and Fourteenth Amendments. *Held:*

1. On the facts here, where the evidence which the prosecutor reasonably expected to produce was objectively and briefly summarized and was not touted to the jury as crucial to the prosecution's case, the court's limiting instructions were sufficient to protect petitioner's constitutional rights. *Douglas* v. *Alabama*, 380 U. S. 415 (1965), and *Bruton* v. *United States*, 391 U. S. 123 (1968), distinguished. Pp. 734–737.

2. In the context of this case, where it is possible that the questioning officer took petitioner's remark about seeing an attorney not as a request that the interrogation cease but as a passing comment, there was no denial of the right to counsel such as existed in *Escobedo;* and *Miranda*, which was decided after petitioner's trial, is inapplicable under *Johnson* v. *New Jersey*, 384 U. S. 719 (1966). Pp. 738–739.

3. On the facts of this case and in view of the "totality of the circumstances" the trial court did not err in holding that petitioner's confession was voluntary. P. 739.

4. The clothing from petitioner's duffel bag was found in the course of a lawful search since Rawls, a joint user of the bag, had authority to consent to its search. P. 740.

388 F. 2d 777, affirmed.

Howard M. Feuerstein argued the cause for petitioner. With him on the brief was *R. A. Nahstoll.*

Arlen Specter argued the cause for respondent. On the brief were *Robert Y. Thornton*, Attorney General of Oregon, and *David H. Blunt*, Assistant Attorney General.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Petitioner was convicted in an Oregon state court of second-degree murder in connection with the September 22, 1964, slaying of one Russell Anton Marleau. After the Supreme Court of Oregon had affirmed his conviction, 245 Ore. 4, 418 P. 2d 841 (1966), petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Oregon. The District Court granted the writ, but the Court of Appeals for the Ninth Circuit reversed, 388 F. 2d 777 (1968). We granted certiorari to consider three contentions of error raised by petitioner. 393 U. S. 821 (1968). Although petitioner's case has been ably briefed and argued by appointed counsel, we find none of these allegations sufficient to warrant reversal.

I.

Petitioner's first argument centers on certain allegedly prejudicial remarks made during the prosecutor's opening statement. Petitioner had been indicted jointly with his cousin, Jerry Lee Rawls, who pleaded guilty to the same offense. Prior to petitioner's trial, petitioner's defense counsel told the prosecutor that Rawls would invoke his privilege against self-incrimination if he were called to the stand; defense counsel warned the prosecutor not to rely in his opening statement upon Rawls' expected testimony. The prosecutor replied that he would act on the basis of "all of the information I have concerning [Rawls'] testimony." Before trial, he consulted with a police officer who had spoken to Rawls and with Rawls' probation officer; each indicated his belief that Rawls would testify. Similar information came, through a sheriff's report, from some of Rawls' close relatives. Because of these reports, the prosecutor concluded that Rawls would testify if asked to do so. The court below felt that the prosecutor also relied on the fact that Rawls had pleaded guilty and was awaiting sentence. This would give him reason, the court felt, to cooperate with the prosecutor.

In any case, after the trial began the prosecutor included in his opening statement a summary of the testimony he expected to receive from Rawls. The summary was not emphasized in any particular way; it took only a few minutes to recite and was sandwiched between a summary of petitioner's own confession and a description of the circumstantial evidence the State would introduce.

At one point the prosecutor referred to a paper he was holding in his hands to refresh his memory about something Rawls had said. Although the State admitted in argument here that the jury might fairly have believed that the prosecutor was referring to Rawls' statement, he did not explicitly tell the jury that this paper was Rawls' confession, nor did he purport to read directly from it. A motion for a mistrial was made at the close of the opening statement, but it was denied. Later, the prosecutor called Rawls to the stand. Rawls informed the court that he intended to assert his privilege against self-incrimination in regard to every question concerning his activities on the morning of September 22, 1964. The matter was not further pursued, and Rawls was dismissed from the stand. His appearance could not have lasted more than two or three minutes. The motion for mistrial was renewed and once again denied.

Petitioner argues that this series of events placed the substance of Rawls' statement before the jury in a way that "may well have been the equivalent in the jury's mind of testimony," *Douglas* v. *Alabama*, 380 U. S. 415, 419 (1965), and that, as in *Bruton* v. *United States*, 391 U. S. 123, 128 (1968), the statement "added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination . . . ." In this way, petitioner claims he was denied his constitutional right of confrontation, guaranteed by the Sixth and Fourteenth Amendments to the Constitution. See *Pointer* v. *Texas*, 380 U. S. 400 (1965). Although the judge did caution the jurors that they "must not regard any statement made by counsel in your presence during the proceedings concerning the facts of this case as evidence," petitioner contends that *Bruton* v. *United States*, *supra*, disposes of the contention that limiting instructions of this sort can be relied upon to cure the error which occurred. Although the question thus posed is not an easy one, we cannot agree with petitioner's conclusion.

First of all, it is clear that this case is quite different from either *Douglas* or *Bruton*. In *Douglas,* the prosecutor called the defendant's coconspirator to the stand and read his alleged confession to him; the coconspirator was required to assert his privilege against self-incrimination repeatedly as the prosecutor asked him to confirm or deny each statement. The Court found that this procedure placed powerfully incriminating evidence before the jury in a manner which effectively denied the right of cross-examination. Here, Rawls was on the stand for a very short time and only a paraphrase of the statement was placed before the jury. This was done not during the trial, while the person making the statement was on the stand, but in an opening statement. In addition, the jury was told that the opening statement should not be considered as evidence. Certainly the impact of the procedure used here was much less damaging than was the case in *Douglas*. And unlike the situation in *Bruton,* the jury was not being asked to perform the mental gymnastics of considering an incriminating statement against only one of two defendants in a joint trial. Moreover, unlike the situation in either *Douglas* or *Bruton,* Rawls' statement was not a vitally important part of the prosecution's case.

We believe that in these circumstances the limiting instructions given were sufficient to protect petitioner's constitutional rights.* As the Court said in *Bruton,* 391 U. S., at 135, "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently." See *Hopt* v. *Utah,* 120

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*A more specific limiting instruction might have been desirable, but none was requested.

U. S. 430, 438 (1887). It may be that some remarks included in an opening or closing statement could be so prejudicial that a finding of error, or even constitutional error, would be unavoidable. But here we have no more than an objective summary of evidence which the prosecutor reasonably expected to produce. Many things might happen during the course of the trial which would prevent the presentation of all the evidence described in advance. Certainly not every variance between the advance description and the actual presentation constitutes reversible error, when a proper limiting instruction has been given. Even if it is unreasonable to assume that a jury can disregard a coconspirator's statement when introduced against one of two joint defendants, it does not seem at all remarkable to assume that the jury will ordinarily be able to limit its consideration to the evidence introduced during the trial. At least where the anticipated, and unproduced, evidence is not touted to the jury as a crucial part of the prosecution's case, "it is hard for us to imagine that the minds of the jurors would be so influenced by such incidental statements during this long trial that they would not appraise the evidence objectively and dispassionately." *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 239 (1940).

The Court of Appeals seemed to feel that this aspect of the case turned on whether or not the prosecutor acted "in a good faith expectation that Rawls would testify." 388 F. 2d, at 780–781. While we do not believe that the prosecutor's good faith, or lack of it, is controlling in determining whether a defendant has been deprived of the right of confrontation guaranteed by the Sixth and Fourteenth Amendments, we agree with the Court of Appeals' factual determination in this case. The evidence presented in the record is sufficient to support the Oregon Supreme Court's conclusion that "the state could reasonably expect [Rawls] to testify in line with his previous statements." 245 Ore., at 9, 418 P. 2d, at 843. Accordingly, there is no need to decide whether the type of prosecutorial misconduct alleged to have occurred would have been sufficient to constitute reversible constitutional error. Cf. *Miller* v. *Pate,* 386 U. S. 1 (1967). Therefore, because we find neither prosecutorial misconduct nor a deprivation of the right of confrontation, we agree with the Court of Appeals that nothing which occurred during the prosecution's opening statement would warrant federal habeas relief.

II.

Petitioner's second argument concerns the admission into evidence of his own confession. The circumstances under which the confession was obtained can be summarized briefly. Petitioner was arrested about 4:15 p. m. on September 24, 1964. He was taken to headquarters where questioning began at about 5 p. m. The interrogation, which was tape-recorded, ended slightly more than an hour later, and by 6:45 p. m. petitioner had signed a written version of his confession.

After the questioning had begun and after a few routine facts were ascertained, petitioner was questioned briefly about the location of his Marine uniform. He was next asked where he was on the night in question. Although he admitted that he was with his cousin Rawls, he denied being with any third person. Then petitioner was given a somewhat abbreviated description of his constitutional rights. He was told that he could have an attorney if he wanted one and that anything he said could be used against him at trial. Questioning thereafter became somewhat more vigorous, but petitioner continued to deny being with anyone but Rawls. At this point, the officer questioning petitioner told him, falsely, that Rawls had been brought in and that he had confessed. Petitioner still was reluctant to talk, but after the officer sympathetically suggested that the victim had started a fight by making homosexual advances, petitioner began to spill out his story. Shortly after he began he again showed signs of reluctance and said, "I think I had better get a lawyer before I talk any more. I am going to get into trouble more than I am in now." The officer replied simply, "You can't be in any more trouble than you are in now," and the questioning session proceeded. A full confession was obtained and, after further warnings, a written version was signed.

Since petitioner was tried after this Court's decision in *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), but before the decision in *Miranda* v. *Arizona,* 384 U. S. 436 (1966), only the rule of the former case is directly applicable. *Johnson* v. *New Jersey,* 384 U. S. 719 (1966). Petitioner argues that his statement about getting a lawyer was sufficient to bring *Escobedo* into play and that the police should immediately have stopped the questioning and obtained counsel for him. We might agree were *Miranda* applicable to this case, for in *Miranda* this Court held that "[i]f . . . [a suspect] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." 384 U. S., at 444–445. But *Miranda* does not apply to this case. This Court in *Johnson* v. *New Jersey* pointedly rejected the contention that the specific commands of *Miranda* should apply to all post-*Escobedo* cases. The Court recognized "[t]he disagreements among other courts concerning the implications of *Escobedo,*" *Johnson* v. *New Jersey, supra,* at 734, and concluded that the States, although free to apply *Miranda* to post-*Escobedo* cases, *id.,* at 733, were not required to do so. The Oregon Supreme Court, in affirming petitioner's conviction, concluded that the confession was properly introduced into evidence. Under *Johnson,* we would be free to disagree with this conclusion only if we felt compelled to do so by the specific holding of *Escobedo.*

We do not believe that *Escobedo* covers this case. Petitioner's statement about seeing an attorney was neither as clear nor as unambiguous as the request Escobedo made. The police in *Escobedo* were unmistakably informed of their suspect's wishes; in fact Escobedo's attorney was present and repeatedly requested permission to see his client. Here, on the other hand, it is possible that the questioning officer took petitioner's remark not as a request that the interrogation cease but merely as a passing comment. Petitioner did not pursue the matter, but continued answering questions. In this context, we cannot find the denial of the right to counsel which was found so crucial in *Escobedo.*

Petitioner also presses the alternative argument that his confession was involuntary and that it should have been excluded for that reason. The trial judge, after an evidentiary hearing during which the tape recording was played, could not agree with this contention, and our reading of the record does not lead us to a contrary conclusion. Before petitioner made any incriminating statements, he received partial warnings of his constitutional rights; this is, of course, a circumstance quite relevant to a finding of voluntariness. *Davis* v. *North Carolina,* 384 U. S. 737, 740–741 (1966). The questioning was of short duration, and petitioner was a mature individual of normal intelligence. The fact that the police misrepresented the statements that Rawls had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible. These cases must be decided by viewing the "totality of the circumstances," see, *e. g., Clewis* v. *Texas,* 386 U. S. 707, 708 (1967), and on the facts of this case we can find no error in the admission of petitioner's confession.

III.

Petitioner's final contention can be dismissed rather quickly. He argues that the trial judge erred in permitting some clothing seized from petitioner's duffel bag to be introduced into evidence. This duffel bag was being used jointly by petitioner and his cousin Rawls and it had been left in Rawls' home. The police, while arresting Rawls, asked him if they could have his clothing. They were directed to the duffel bag and both Rawls and his mother consented to its search. During this search, the officers came upon petitioner's clothing and it was seized as well. Since Rawls was a joint user of the bag, he clearly had authority to consent to its search. The officers therefore found evidence against petitioner while in the course of an otherwise lawful search. Under this Court's past decisions, they were clearly permitted to seize it. *Harris* v. *United States,* 390 U. S. 234 (1968); *Warden* v. *Hayden,* 387 U. S. 294 (1967). Petitioner argues that Rawls only had actual permission to use one compartment of the bag and that he had no authority to consent to a search of the other compartments. We will not, however, engage in such metaphysical subtleties in judging the efficacy of Rawls' consent. Petitioner, in allowing Rawls to use the bag and in leaving it in his house, must be taken to have assumed the risk that Rawls would allow someone else to look inside. We find no valid search and seizure claim in this case.

Because we find none of petitioner's contentions meritorious, we affirm the judgment of the Court of Appeals.

Affirmed.

MR. CHIEF JUSTICE WARREN and MR. JUSTICE DOUGLAS concur in the result.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

BINGLER, DISTRICT DIRECTOR OF INTERNAL REVENUE *v.* JOHNSON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 473. Argued March 3-4, 1969.—Decided April 23, 1969.

Respondents, who held engineering positions at a laboratory which the Westinghouse Electric Corp. operates under contract with the Atomic Energy Commission, participated in a two-phase Fellowship Program. In the first, or "work-study," phase, a participating employee holds a regular job at Westinghouse and attends university classes part time, for which the tuition and other expenses are paid by the company. A qualified employee may then be granted an educational leave of absence (the second phase) to work on his doctoral dissertation, approval of which by Westinghouse and the AEC is based partly on general relevancy to work at the laboratory. He then devotes full time to the dissertation for a period of several months, during which he receives a "stipend" from Westinghouse ranging from 70% to 90% of his prior salary plus a family allowance; retains seniority status; and receives insurance, stock option privileges, and other employee benefits. He is obligated to submit progress reports while on leave, and on its completion to return to Westinghouse for at least two years. Respondents filed refund claims for federal income taxes withheld by Westinghouse from the amounts paid them while on leave, contending that these payments were "scholarships" and hence excludable under § 117 of the Internal Revenue Code of 1954. On rejection of their claims respondents brought this refund suit in District Court. At the trial the court instructed the jury in accordance with Treas. Reg. § 1.117-4 (c), which was promulgated under § 117 and provides that amounts representing "compensation for . . . employment services" and amounts paid "to enable [an individual] to pursue studies . . . primarily for the benefit of the grantor," are not excludable as scholarships. The jury found that the amounts that respondents received were taxable income. The Court of Appeals, holding the regulation invalid, reversed. *Held:* Treas. Reg. § 1.117-4 (c) is valid, and the jury properly found that the amounts respondents received were not excludable "scholarships" but taxable "compensation." Pp. 747-758.

396 F. 2d 258, reversed.

Harris Weinstein argued the cause for petitioner. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Walters,* former *Assistant Attorney General Rogovin, Jonathan S. Cohen,* and *Michael B. Arkin.*

James C. Larrimer argued the cause and filed a brief for respondents.

MR. JUSTICE STEWART delivered the opinion of the Court.

We are called upon in this case to examine for the first time § 117 of the Internal Revenue Code of 1954, which excludes from a taxpayer's gross income amounts received as "scholarships" and "fellowships." The question before us concerns the tax treatment of payments received by the respondents[1] from their employer, the Westinghouse Electric Corporation, while they were on "educational leave" from their jobs with Westinghouse.

During the period here in question the respondents held engineering positions at the Bettis Atomic Power Laboratory in Pittsburgh, Pennsylvania, which Westinghouse operates under a "cost-plus" contract with the Atomic Energy Commission. Their employment status enabled them to participate in what is known as the Westinghouse Bettis Fellowship and Doctoral Program. That program, designed both to attract new employees seeking further education and to give advanced training to persons already employed at Bettis, offers a two-phase schedule of subsidized postgraduate study in engineering, physics, or mathematics.

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[1] We refer only to respondents Richard E. Johnson, Richard A. Wolfe, and Martin L. Pomerantz; their wives are parties to this action solely because joint tax returns were filed for the years in question.

Under the first, or "work-study," phase, a participating employee holds a regular job with Westinghouse and in addition pursues a course of study at either the University of Pittsburgh or Carnegie-Mellon University.[2] The employee is paid for a 40-hour work week, but may receive up to eight hours of "release time" per week for the purpose of attending classes.[3] "Tuition remuneration," as well as reimbursement for various incidental academic expenses, is provided by the company.[4]

When an employee has completed all preliminary requirements for his doctorate, he may apply for an educational leave of absence, which constitutes the second phase of the Fellowship Program. He must submit a proposed dissertation topic for approval by Westinghouse and the AEC. Approval is based, *inter alia,* on a determination that the topic has at least some general relevance to the work done at Bettis. If the leave of absence is secured, the employee devotes his full attention, for a period of at least several months,[5] to fulfilling his dissertation requirement. During this period he receives a "stipend" from Westinghouse, in an amount based on a specified percentage (ranging from 70% to 90%) of his prior salary plus "adders," depending upon the size of his family.[6] He also retains his seniority status and receives all employee benefits, such as insurance and stock option privileges. In return he not only must submit periodic progress reports, but under the written agreement that all participants in the program must sign, also is obligated to return to the employ of Westinghouse for a period of at least two years following completion of his leave.[7] Upon return he is, according to the agreement, to "assume . . . duties commensurate with his education and experience," at a salary "commensurate with the duties assigned."

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[2] Formerly Carnegie Institute of Technology.

[3] A maximum of 156 hours of release time per year is allowed.

[4] The Fellowship Program is funded jointly by Westinghouse and the AEC, but the amounts paid to participating employees are channeled through the company's payroll office.

[5] The ordinary leave period is nine months.

[6] Maximum monthly limits are placed on the amounts paid.

The respondents all took leaves under the Fellowship Program at varying times during the period 1960–1962,[8] and eventually received their doctoral degrees in engineering. Respondents Johnson and Pomerantz took leaves of nine months and were paid $5,670 each, representing 80% of their prior salaries at Westinghouse. Respondent Wolfe, whose leave lasted for a year, received $9,698.90, or 90% of his previous salary. Each returned to Westinghouse for the required period of time following his educational leave.

Westinghouse, which under its own accounting system listed the amounts paid to the respondents as "indirect labor" expenses, withheld federal income tax from those amounts.[9] The respondents filed claims for refund, contending that the payments they had received were

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[7] Respondent Wolfe began his leave at a time when Westinghouse did not require agreement in writing to the two-year "return" commitment. He was formally advised before he went on leave, however, that he was "expected" to return to Westinghouse for a period of time equal to the duration of his leave, and he in fact honored that obligation.

[8] Respondent Wolfe was on leave from March 1, 1960, to February 28, 1961; respondent Johnson from October 1, 1960, to June 30, 1961; and respondent Pomerantz from November 1, 1961, to July 31, 1962.

[9] Tuition and incidental fees were also paid by Westinghouse, but no withholding was made from those payments, and their tax status is not at issue in this case. Although conceptually includable in income, such sums presumably would be offset by educational expense deductions. See Treas. Reg. on Income Tax (1954 Code) § 1.162–5, 26 CFR § 1.162–5.

"scholarships," and hence were excludable from income under § 117 of the Code, which provides in pertinent part:

> "(a) General rule.
>
> "In the case of an individual, gross income does not include—
>
> "(1) any amount received—
>
> "(A) as a scholarship at an educational institution (as defined in section 151 (e)(4)), or
>
> "(B) as a fellowship grant . . . ." [10]

When those claims were rejected, the respondents instituted this suit in the District Court for the Western

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[10] The entire section reads as follows:

"§ 117. Scholarships and fellowship grants.

"(a) General rule.

"In the case of an individual, gross income does not include—

"(1) any amount received—

"(A) as a scholarship at an educational institution (as defined in section 151 (e)(4)), or

"(B) as a fellowship grant, including the value of contributed services and accommodations; and

"(2) any amount received to cover expenses for—

"(A) travel,

"(B) research,

"(C) clerical help, or

"(D) equipment,

"which are incident to such a scholarship or to a fellowship grant, but only to the extent that the amount is so expended by the recipient.

"(b) Limitations.

"(1) Individuals who are candidates for degrees.

"In the case of an individual who is a candidate for a degree at an educational institution (as defined in section 151 (e)(4)), subsection (a) shall not apply to that portion of any amount received which represents payment for teaching, research, or other services in the nature of part-time employment required as a condition to receiving the scholarship or the fellowship grant. If teaching, research, or other services are required of all candidates (whether or not recipients of scholarships or fellowship grants) for a particular degree as a condition to receiving such degree, such teach-

District of Pennsylvania, against the District Director of Internal Revenue. After the basically undisputed evidence regarding the Bettis Program had been presented, the trial judge instructed the jury in accordance with Treas. Reg. on Income Tax (1954 Code) § 1.117-4 (c), 26 CFR § 1.117-4 (c), which provides that amounts representing "compensation for past, present, or future employment services," and amounts "paid . . . to . . . an individual to enable him to pursue studies or research primarily for the benefit of the grantor," are not exclud-

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ing, research, or other services shall not be regarded as part-time employment within the meaning of this paragraph.

"(2) Individuals who are not candidates for degrees.

"In the case of an individual who is not a candidate for a degree at an educational institution (as defined in section 151 (e)(4)), subsection (a) shall apply only if the condition in subparagraph (A) is satisfied and then only within the limitations provided in subparagraph (B).

"(A) Conditions for exclusion.

"The grantor of the scholarship or fellowship grant is—

"(i) an organization described in section 501 (c)(3) which is exempt from tax under section 501 (a),

"(ii) a foreign government,

"(iii) an international organization, or a binational or multinational education and cultural foundation or commission created or continued pursuant to the Mutual Educational and Cultural Exchange Act of 1961, or

"(iv) the United States, or an instrumentality or agency thereof, or a State, a territory, or a possession of the United States, or any political subdivision thereof, or the District of Columbia.

"(B) Extent of exclusion.

"The amount of the scholarship or fellowship grant excluded under subsection (a)(1) in any taxable year shall be limited to an amount equal to $300 times the number of months for which the recipient received amounts under the scholarship or fellowship grant during such taxable year, except that no exclusion shall be allowed under subsection (a) after the recipient has been entitled to exclude under this section for a period of 36 months (whether or not consecutive) amounts received as a scholarship or fellowship grant while not a candidate for a degree at an educational institution (as defined in section 151 (e)(4))."

able as scholarships.[11] The jury found that the amounts received by the respondents were taxable income. Respondents then sought review in the Court of Appeals for the Third Circuit, and that court reversed, holding that the Regulation referred to was invalid, that the jury instructions were therefore improper, and that on the essentially undisputed facts it was clear as a matter of law that the amounts received by the respondents were "scholarships" excludable under § 117. 396 F. 2d 258.

The holding of the Court of Appeals with respect to Treas. Reg. § 1.117-4 (c) was contrary to the decisions of several other circuits—most notably, that of the Fifth

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[11] "§ 1.117-4. Items not considered as scholarships or fellowship grants.

"The following payments or allowances shall not be considered to be amounts received as a scholarship or a fellowship grant for the purpose of section 117:

. . . . .

"(c) Amounts paid as compensation for services or primarily for the benefit of the grantor. (1) Except as provided in paragraph (a) of § 1.117-2, any amount paid or allowed to, or on behalf of, an individual to enable him to pursue studies or research, if such amount represents either compensation for past, present, or future employment services or represents payment for services which are subject to the direction or supervision of the grantor.

"(2) Any amount paid or allowed to, or on behalf of, an individual to enable him to pursue studies or research primarily for the benefit of the grantor.

"However, amounts paid or allowed to, or on behalf of, an individual to enable him to pursue studies or research are considered to be amounts received as a scholarship or fellowship grant for the purpose of section 117 if the primary purpose of tne studies or research is to further the education and training of the recipient in his individual capacity and the amount provided by the grantor for such purpose does not represent compensation or payment for the services described in subparagraph (1) of this paragraph. Neither the fact that the recipient is required to furnish reports of his progress to the grantor, nor the fact that the results of his studies or research may be of some incidental benefit to the grantor shall, of itself, be considered to destroy the essential character of such amount as a scholarship or fellowship grant."

Circuit in *Ussery* v. *United States*, 296 F. 2d 582, which explicitly sustained the Regulation against attack and held amounts received under an arrangement quite similar to the Bettis Program to be taxable income.[12] Accordingly, upon the District Director's petition, we granted certiorari to resolve the conflict and to determine the proper scope of § 117 and Treas. Reg. § 1.117-4 (c) with respect to payments such as those involved here. 393 U. S. 949.

In holding invalid the Regulation that limits the definitions of "scholarship" and "fellowship" so as to exclude amounts received as "compensation," the Court of Appeals emphasized that the statute itself expressly adverts to certain situations in which funds received by students may be thought of as remuneration. After the basic rule excluding scholarship funds from gross income is set out in § 117 (a), for instance, subsection (b)(1) stipulates:

> "In the case of an individual who is a candidate for a degree at an educational institution . . . , subsection (a) shall not apply to that portion of any amount received which represents payment for teaching, research, or other services in the nature of part-time employment required as a condition to receiving the scholarship or the fellowship grant." [13]

In addition, subsection (b)(2) limits the exclusion from income with regard to nondegree candidates in two respects: first, the grantor must be a governmental agency, an international organization, or an organization exempt from tax under §§ 501 (a), (c)(3) of the Code; and second, the maximum exclusion from income available to a nondegree candidate is $300 per month for not more than 36 months. Since these exceptions are expressly set out in the statute, the Court of Appeals, relying on the canon of construction that *expressio unius est exclusio alterius,* concluded that no additional restrictions may be put on the basic exclusion from income granted by subsection (a)—a conclusion forcefully pressed upon us by the respondents.

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[12] Generally in accord with *Ussery* are *Reese* v. *Commissioner*, 373 F. 2d 742 (C. A. 4th Cir.); *Stewart* v. *United States*, 363 F. 2d 355 (C. A. 6th Cir.); and *Woddail* v. *Commissioner*, 321 F. 2d 721 (C. A. 10th Cir.). See also *Reiffen* v. *United States*, 180 Ct. Cl. 296, 376 F. 2d 883.

[13] Subsection (b) goes on to except from that limitation situations in which "teaching, research, or other services are required of all candidates (whether or not recipients of scholarships or fellowship grants) for a particular degree as a condition to receiving such degree . . . ." In those situations, scholarship or fellowship funds received for such services are nontaxable. See n. 10, *supra*.

Congress' express reference to the limitations just referred to concededly lends some support to the respondents' position. The difficulty with that position, however, lies in its implicit assumption that those limitations are limitations on an exclusion of *all funds* received by students to support them during the course of their education. Section 117 provides, however, only that amounts received as "scholarships" or "fellowships" shall be excludable. And Congress never defined what it meant by the quoted terms. As the Tax Court has observed:

> "[A] proper reading of the statute requires that before the exclusion comes into play there must be a determination that the payment sought to be excluded has the normal characteristics associated with the term 'scholarship.'" *Reese* v. *Commissioner,* 45 T. C. 407, 413, aff'd, 373 F. 2d 742.

The regulation here in question represents an effort by the Commissioner to supply the definitions that Congress omitted.[14] And it is fundamental, of course, that as

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[14] See also Treas. Reg. on Income Tax (1954 Code) §§ 1.117-3 (a), (c), 26 CFR §§ 1.117-3 (a), (c), which set out the "normal characteristics" associated with scholarships and fellowships:

"§ 1.117-Definitions.

"(a) Scholarship. A scholarship generally means an amount paid "contemporaneous constructions by those charged with administration of" the Code, the Regulations "must be sustained unless unreasonable and plainly inconsistent with the revenue statutes," and "should not be overruled except for weighty reasons." *Commissioner* v. *South Texas Lumber Co.,* 333 U. S. 496, 501. In this respect our statement last Term in *United States* v. *Correll,* 389 U. S. 299, bears emphasis:

> "[W]e do not sit as a committee of revision to perfect the administration of the tax laws. Congress

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or allowed to, or for the benefit of, a student, whether an undergraduate or a graduate, to aid such individual in pursuing his studies. The term includes the value of contributed services and accommodations (see paragraph (d) of this section) and the amount of tuition, matriculation, and other fees which are furnished or remitted to a student to aid him in pursuing his studies. The term also includes any amount received in the nature of a family allowance as a part of a scholarship. However, the term does not include any amount provided by an individual to aid a relative, friend, or other individual in pursuing his studies where the grantor is motivated by family or philanthropic considerations. If an educational institution maintains or participates in a plan whereby the tuition of a child of a faculty member of such institution is remitted by any other participating educational institution attended by such child, the amount of the tuition so remitted shall be considered to be an amount received as a scholarship.

. . . . .

"(c) Fellowship grant. A fellowship grant generally means an amount paid or allowed to, or for the benefit of, an individual to aid him in the pursuit of study or research. The term includes the value of contributed services and accommodations (see paragraph (d) of this section) and the amount of tuition, matriculation, and other fees which are furnished or remitted to an individual to aid him in the pursuit of study or research. The term also includes any amount received in the nature of a family allowance as a part of a fellowship grant. However, the term does not include any amount provided by an individual to aid a relative, friend, or other individual in the pursuit of study or research where the grantor is motivated by family or philanthropic considerations."

We are not concerned in this case with distinctions between the terms "scholarship" and "fellowship."

> has delegated to the Commissioner, not to the courts, the task of prescribing 'all needful rules and regulations for the enforcement' of the Internal Revenue Code. 26 U. S. C. § 7805 (a). In this area of limitless factual variations, 'it is the province of Congress and the Commissioner, not the courts, to make the appropriate adjustments.'" *Id.*, at 306–307.

Here, the definitions supplied by the Regulation clearly are prima facie proper, comporting as they do with the ordinary understanding of "scholarships" and "fellowships" as relatively disinterested, "no-strings" educational grants, with no requirement of any substantial *quid pro quo* from the recipients.

The implication of the respondents' *expressio unius* reasoning is that any amount paid for the purpose of supporting one pursuing a program of study or scholarly research should be excludable from gross income as a "scholarship" so long as it does not fall within the specific limitations of § 117 (b). Pay received by a $30,000 per year engineer or executive on a leave of absence would, according to that reasoning, be excludable as long as the leave was granted so that the individual could perform work required for a doctoral degree. This result presumably would not be altered by the fact that the employee might be performing, in satisfaction of his degree requirements, precisely the same work which he was doing for his employer prior to his leave and which he would be doing after his return to "employment"—or by the fact that the fruits of that work were made directly available to and exploited by the employer. Such a result would be anomalous indeed, especially in view of the fact that under § 117 the comparatively modest sums received by part-time teaching assistants are clearly subject to taxation.[15] Particularly in light of the principle that exemptions from taxation are to be construed narrowly,[16] we decline to assume that Congress intended to sanction—indeed, as the respondents would have it, to compel—such an inequitable situation.[17]

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[15] Cf. 1 J. Mertens, Law of Federal Income Taxation § 7.42, p. 110 (P. Zimet & W. Oliver rev. ed. 1962).

The legislative history underlying § 117 is, as the Court of Appeals recognized, "far from clear." [18] We do not believe, however, that it precludes, as "plainly inconsistent" with the statute, a definition of "scholarship" that excludes from the reach of that term amounts received as compensation for services performed. The 1939 Internal Revenue Code, like predecessor Codes, contained no specific provision dealing with scholarship grants. Whether such grants were includable in gross income depended simply upon whether they fell within the broad provision excluding from income amounts received as "gifts." [19] Thus case-by-case determinations regarding grantors' motives were necessary. The cases decided under this approach prior to 1954 generally involved two types of financial assistance: grants to research or teaching assistants—graduate students who perform research or teaching services in return for their stipends—and foundation grants to post-doctoral researchers. In cases decided shortly before the 1954 Code was enacted, the Tax Court, relying on the "gift" approach to scholarships and fellowships, held that amounts received by a research assistant were taxable income,[20] but reached divergent results in situations involving grants to post-doctoral researchers.[21]

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[16] See *Commissioner* v. *Jacobson,* 336 U. S. 28, 48–49; *Helvering* v. *Northwest Steel Rolling Mills, Inc.,* 311 U. S. 46, 49.

[17] The opinion of the Court of Appeals reiterates that the stipends received by the respondents were "reasonable." Those payments approximated, of course, the respondents' previous engineering salaries. In any event, given the court's *expressio unius* reasoning, the source of a limitation based on the "reasonableness" of amounts granted to bona fide students is difficult to identify.

[18] 396 F. 2d, at 263.

[19] Int. Rev. Code of 1939, c. 1, § 22 (b)(3), 53 Stat. 10; see Int. Rev. Code of 1954, § 102.

In enacting § 117 of the 1954 Code, Congress indicated that it wished to eliminate the necessity for reliance on "case-by-case" determinations with respect to whether "scholarships" and "fellowships" were excludable as "gifts." Upon this premise the respondents hinge their argument that Congress laid down a standard under which all case-by-case determinations—such as those that may be made under Treas. Reg. § 1.117-4 (c)—are unnecessary and improper. We have already indicated, however, our reluctance to believe that § 117 was designed to exclude from taxation all amounts, no matter how large or from what source, that are given for the support of one who happens to be a student. The sounder inference is that Congress was merely "recogni[zing] that scholarships and fellowships are sufficiently unique . . . to merit [tax] treatment separate from that accorded gifts,"[22] and attempting to provide that grants falling within those categories should be treated consistently—as in some instances, under the generic provisions of the 1939 Code, they arguably had not been. Delineation of the precise contours of those categories was left to the Commissioner.

Furthermore, a congressional intention that not all grants received by students were necessarily to be "scholarships" may reasonably be inferred from the legislative history. In explaining the basis for its version of § 117 (b)(2),[23] the House Ways and Means Committee stated that its purpose was to "tax those grants which are in effect merely payments of a salary during a period while the recipient is on leave from his regular job." [24] This comment related, it is true, to a specific exception to the exclusion from income set out in subsection (a). But, in view of the fact that the statute left open the definitions of "scholarship" and "fellowship," it is not unreasonable to conclude that in adding subsection (b) to the statute Congress was merely dealing explicitly with those problems that had come explicitly to its attention—*viz.*, those involving research and teaching assistantships and post-doctoral research grants—without intending to forbid application to similar situations of the general principle underlying its treatment of those problems. One may justifiably suppose that the Congress that taxed funds received by "part-time" teaching assistants, presumably on the ground that the amounts received by such persons really represented compensation for services performed,[25] would also deem proper a definition of "scholarship" under which comparable sorts of compensation—which often, as in the present case, are significantly greater in amount—are likewise taxable.[26]

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[20] See, *e. g.*, *Banks* v. *Commissioner*, 17 T. C. 1386.

[21] Compare *Ti Li Loo* v. *Commissioner*, 22 T. C. 220 (university grant for National Health Service research held taxable), with *Stone* v. *Commissioner*, 23 T. C. 254 (foundation grant held nontaxable).

[22] Gordon, Scholarship and Fellowship Grants as Income: A Search for Treasury Policy, 1960 Wash. U. L. Q. 144, 151.

[23] That version provided for the exclusion only of grants that, together with compensation received from the recipient's former

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employer, were less than 75% of his salary for the preceding year. Noting that the House bill would have taxed many modest grants simply because the recipient had no substantial earned income in the previous year, the Senate rejected that formulation and substituted the present $300 per month, 36-month provision of § 117 (b)(2). See H. R. Rep. No. 1337, 83d Cong., 2d Sess., 17; S. Rep. No. 1622, 83d Cong., 2d Sess., 18.

[24] H. R. Rep. No. 1337, *supra*, n. 23, at 17.

[25] The House version of § 117 (b)(1) taxed only amounts received as payment for teaching and research services. The Senate amended the provision, however, to include payments for "other services" as well. See S. Rep. No. 1622, *supra*, n. 23, at 18.

[26] In connection with the question of what Congress may have intended to denote by the terms "scholarship" and "fellowship," it is noteworthy that the House Report stated, "Such grants gen-

In providing such a definition, the Commissioner has permissibly implemented an underlying congressional concern.[27] We cannot say that the provision of Treas. Reg. § 1.117-4 (c) that taxes amounts received as "compensation" is "unreasonable or plainly inconsistent with the . . . statut[e]." [28]

Under that provision, as set out in the trial court's instructions,[29] the jury here properly found that the

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erally are of small amount and are usually received by individuals who would have little or no tax liability in any case." H. R. Rep. No. 1337, *supra*, n. 23, at 17.

[27] The Court of Appeals viewed the "primary purpose" of § 117 as the "encourage[ment of] financial aid to education through tax relief." 396 F. 2d, at 262. But while some desire to aid scholarship students no doubt underlay enactment of the statute, that desire must be reconciled with an apparent congressional intent—manifested in the limitations set out in subsection (b)—to tax amounts that represent compensation for services performed. As the text makes clear, we cannot view the Commissioner's attempt to achieve that reconciliation as improper.

[28] The Court of Appeals seems to have recognized that in some circumstances the Commissioner's approach is justified. Its opinion stated:

"A significant commitment by the student in return for a grant would, of course, place that grant outside the category 'scholarship,' at least to the extent of the value of that commitment. For if the grantee had to barter for his stipend, giving full value for it, this arrangement would hardly serve the primary purpose of the § 117 exclusion: to encourage financial aid to education through tax relief." 396 F. 2d, at 262.

It is not clear how this position can be squared with the Court of Appeals' holding that Treas. Reg. § 1.117-4 (c) is invalid. In any event, as we suggest *infra*, we cannot agree with the conclusion of the Court of Appeals that the grants received by the respondents were not "bartered for."

[29] The instructions included, *inter alia*, the following passage:

"You are . . . instructed that, one, any amount of money paid to an individual to enable him to pursue studies or research, if such amount represents either compensation for past, present or future amounts received by the respondents were taxable "compensation" rather than excludable "scholarships." [30] The employer-employee relationship involved is immediately

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employment services, or represents payment for services which are subject to the direction or supervision of the grantor, . . . is not a scholarship or fellowship under the tax laws.

"Two, any amount of money paid to an individual to enable him to pursue studies or research which studies or research are primarily for the benefit of the grantor is not a scholarship under the tax laws."

[30] We thus endorse the decisions of the Fifth and Sixth Circuits in *Ussery* v. *United States,* 296 F. 2d 582, and *Stewart* v. *United States,* 363 F. 2d 355. In *Ussery,* the Court of Appeals for the Fifth Circuit specifically upheld Treas. Reg. § 1.117–4 (c) and held taxable monthly payments received by an employee of the Mississippi Department of Public Welfare who had been given leave to secure a master's degree in social work. The taxpayer there received employee benefits while on leave, and was obligated to return to the department following completion of his studies. *Stewart* involved a similar arrangement under which an employee of the Tennessee Department of Public Welfare received monthly stipends and other benefits during an educational leave of absence but was required to return thereafter to her previous position. See *Reese* v. *Commissioner,* 373 F. 2d 742 (C. A. 4th Cir.), affirming 45 T. C. 407 (student-teacher); *Woddail* v. *Commissioner,* 321 F. 2d 721 (C. A. 10th Cir.) (resident physician; obligated to remain following part-time participation in training program); cf. *Reiffen* v. *United States,* 180 Ct. Cl. 296, 376 F. 2d 883 (relying solely on characterization of payments as "primarily for benefit of grantor"). Several Tax Court decisions point in the same direction, although treatment of various factual situations under § 117 has not been marked by a great deal of consistency. See generally Tabac, Scholarships and Fellowship Grants: An Administrative Merry-Go-Round, 46 Taxes 485 (1968).

The Commissioner has acquiesced in *Evans* v. *Commissioner,* 34 T. C. 720 (see 1965–1 Cum. Bull. 4), which allowed exclusion where, although the taxpayer was obligated to work for the grantor following completion of her studies, there had been no previous employment relationship. See Rev. Rul. 65–146, 1965–1 Cum. Bull. 66. We are informed by the Solicitor General, however, that the *Evans* acquiescence will be modified. See also *Broniwitz* v. *Com-*

suggestive, of course, as is the close relation between the respondents' prior salaries and the amount of their "stipends." In addition, employee benefits were continued. Topics were required to relate at least generally to the work of the Bettis Laboratory. Periodic work reports were to be submitted. And, most importantly, Westinghouse unquestionably extracted a *quid pro quo.* The respondents not only were required to hold positions with Westinghouse throughout the "work-study" phase of the program, but also were obligated to return to Westinghouse's employ for a substantial period of time after completion of their leave.[31] The thrust of the provision dealing with compensation is that bargained-for payments, given only as a "*quo*" in return for the *quid* of services rendered—whether past, present, or future—should not be excludable from income as

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missioner, P-H 1968 TC Mem. Dec. ¶68,221 (Sept. 30, 1968) (requirement of summer employment with grantor; held excludable).

[31] The contract's provision that employees who avail themselves of educational leave will be assigned duties "commensurate with [their] education and experience," and compensated at rates "commensurate with" those duties, is hardly sufficient to avoid the clear inference that their grants are fully bargained for and in the nature of compensation. The program is featured in Westinghouse's recruiting efforts as a benefit attractive to many potential employees. Moreover, as suggested in the text, participation in the program undeniably means giving up the right to take more remunerative employment elsewhere for a considerable period of time. Had the company modified its program so that the amounts of the "fellowship" grants were spread over the years preceding and following the educational leave—as increments to the respondents' salary, set aside in a company-administered "educational fund"—there could be little doubt that those amounts would have represented compensation. We see no persuasive reason why a different tax result should be reached under Treas. Reg. § 1.117-4 (c) on the actual facts involved here. There is no merit in the respondents' oblique suggestion that payment for *present* services is somehow different, with respect to the question before us, from deferred or anticipatory payments.

"scholarship" funds.[32] That provision clearly covers this case.

Accordingly, the judgment of the Court of Appeals is reversed, and that of the District Court reinstated.

It is so ordered.

MR. JUSTICE DOUGLAS would affirm the judgment for the reasons stated by the Court of Appeals in 396 F. 2d 258.

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[32] We accept the suggestion in the Government's brief that the second paragraph of Treas. Reg. § 1.117-4 (c)—which excepts from the definition of "scholarship" any payments that are paid to an individual "to enable him to pursue studies or research primarily for the benefit of the grantor"—is merely an adjunct to the initial "compensation" provision:

"By this paragraph, the Treasury has supplemented the first in order to impose tax on bargained-for arrangements that do not create an employer-employee relation, as, for example, in the case of an independent contractor. But the general idea is the same: 'scholarship' or 'fellowship' does not include arrangements where the recipient receives money and in return provides a *quid pro quo.*" Brief for Petitioner 22.

The respondents point out that the Internal Revenue Service is considering possible revisions of the Regulations under § 117. The Solicitor General informs us, however, that although revisions might "conform the Regulations to the results reached" in such cases as *Wells* v. *Commissioner,* 40 T. C. 40, no changes are contemplated with respect to situations such as that involved here. Reply Brief for Petitioner in support of certiorari 3, n. 2; see Rev. Rul. 65-59, 1965-1 Cum. Bull. 67.

NATIONAL LABOR RELATIONS BOARD *v.* WYMAN-GORDON CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 463. Argued March 3, 1969.—
Decided April 23, 1969.

The National Labor Relations Board (NLRB) ordered a representation election among respondent's employees, and directed respondent to furnish a list of names and addresses of employees eligible to vote. Respondent refused to furnish the list, the election was held without it, and the unions were defeated. The NLRB ordered a new election and respondent again refused to obey an NLRB order to supply the list. The NLRB issued a subpoena ordering respondent to provide the list or records showing the employees' names and addresses. The NLRB filed an action in the District Court seeking to have its subpoena enforced or to have an injunction issued to compel compliance with its order. The District Court held the NLRB's order valid and directed respondent to comply. The Court of Appeals reversed, holding the order invalid because it was based on a rule laid down in an earlier NLRB decision, *Excelsior Underwear Inc.*, 156 N. L. R. B. 1236, which rule had not been promulgated in accordance with the rule-making requirements of the Administrative Procedure Act. *Held:* The judgment of the Court of Appeals is reversed and the case is remanded to the District Court with directions to reinstate its judgment. Pp. 761–775.

397 F. 2d 394, reversed and remanded.

MR. JUSTICE FORTAS, joined by THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE WHITE, concluded that:

1. In the *Excelsior* case the NLRB purported to exercise its quasi-legislative power and make a rule without following the rule-making requirements of the Administrative Procedure Act. The *Excelsior* "rule" is therefore invalid. Pp. 763–765.

2. Here respondent was directed in an adjudicatory proceeding to submit a list of employees for use in connection with an election,

and it was not the *Excelsior* "rule" but this valid order that respondent was required to obey. P. 766.

3. The requirement of disclosure of employees' names is substantively valid as the NLRB has wide discretion to ensure the fair and free choice of bargaining representatives and such disclosure furthers this objective. P. 767.

4. The list of names comes within the scope of the term "evidence" in § 11 of the National Labor Relations Act and so may properly be subpoenaed by the NLRB. Pp. 768–769.

Mr. Justice Black, joined by Mr. Justice Brennan and Mr. Justice Marshall, concluded that:

1. The requirement that an employer supply a list of employees prior to an election is valid and can be enforced by subpoena. P. 769.

2. The *Excelsior* practice was adopted by the NLRB as a legitimate incident to the adjudication of a specific case and the NLRB properly followed the procedures applicable to "adjudication" rather than "rule making." Pp. 770–775.

(a) NLRB's adjudicatory and rule-making powers are almost inseparably related and the exercise of one power does not exclude the use of the other. Pp. 770–771.

(b) The choice between proceeding by general rule or by adjudication lies primarily in the informed discretion of the NLRB. Pp. 771–772.

(c) All procedural safeguards required for adjudication were satisfied in the *Excelsior* case and that decision did constitute adjudication within the meaning of the Administrative Procedure Act. Pp. 772–773.

(d) Even though the *Excelsior* list-furnishing requirement was to apply prospectively, the *Excelsior* order should not be regarded as any less a part of the adjudicatory process merely because the NLRB did not feel that it should upset Excelsior Company's reliance on past refusals to compel disclosure by setting aside that particular election. Pp. 773–774.

(e) It would be impractical to require the NLRB, in effect, to proceed by adjudication only when it could decide, *prior* to adjudicating a specific case, that any new practice to be adopted would be applied retroactively. Pp. 774–775.

Solicitor General Griswold argued the cause for petitioner. With him on the brief were *Francis X.*

Beytagh, Jr., Arnold Ordman, Dominick L. Manoli, and *Norton J. Come.*

Quentin O. Young argued the cause and filed a brief for respondent.

J. Albert Woll, Laurence Gold, and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging reversal.

MR. JUSTICE FORTAS announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE WHITE join.

On the petition of the International Brotherhood of Boilermakers and pursuant to its powers under § 9 of the National Labor Relations Act, 49 Stat. 453, 29 U. S. C. § 159, the National Labor Relations Board ordered an election among the production and maintenance employees of the respondent company. At the election, the employees were to select one of two labor unions as their exclusive bargaining representative, or to choose not to be represented by a union at all. In connection with the election, the Board ordered the respondent to furnish a list of the names and addresses of its employees who could vote in the election, so that the unions could use the list for election purposes. The respondent refused to comply with the order, and the election was held without the list. Both unions were defeated in the election.

The Board upheld the unions' objections to the election because the respondent had not furnished the list, and the Board ordered a new election. The respondent again refused to obey a Board order to supply a list of employees, and the Board issued a subpoena ordering the respondent to provide the list or else produce its personnel and payroll records showing the employees' names and addresses. The Board filed an action in the United

States District Court for the District of Massachusetts seeking to have its subpoena enforced or to have a mandatory injunction issued to compel the respondent to comply with its order.

The District Court held the Board's order valid and directed the respondent to comply. 270 F. Supp. 280 (1967). The United States Court of Appeals for the First Circuit reversed. 397 F. 2d 394 (1968). The Court of Appeals thought that the order in this case was invalid because it was based on a rule laid down in an earlier decision by the Board, *Excelsior Underwear Inc.,* 156 N. L. R. B. 1236 (1966), and the *Excelsior* rule had not been promulgated in accordance with the requirements that the Administrative Procedure Act prescribes for rule making, 5 U. S. C. § 553.* We granted certiorari to resolve a conflict among the circuits concerning the validity and effect of the *Excelsior* rule. 393 U. S. 932 (1968).[1]

I.

The *Excelsior* case involved union objections to the certification of the results of elections that the unions had lost at two companies. The companies had denied the unions a list of the names and addresses of employees eligible to vote. In the course of the proceedings, the Board "invited certain interested parties" to file briefs and to participate in oral argument of the issue whether the Board should require the employer to furnish lists of employees. 156 N. L. R. B., at 1238. Various employer groups and trade unions did so, as *amici curiae*. After these proceedings, the Board issued its decision in *Excelsior*. It purported to establish the general rule that such a list must be provided, but it declined to apply its new rule to the companies involved in the *Excelsior* case. Instead, it held that the rule would apply "only in those elections that are directed, or consented to, subsequent to 30 days from the date of [the] Decision." *Id.*, at 1240, n. 5.

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*[REPORTER'S NOTE: The citations to the Administrative Procedure Act in the opinions in this case are to Supplement IV of the 1964 edition of the U. S. Code.]

[1] When we granted certiorari, the Fifth Circuit had expressly approved the procedure the Board followed in adopting the *Excelsior* rule. *Howell Refining Co.* v. *NLRB,* 400 F. 2d 213 (1968). Two other circuits had approved enforcement of the *Excelsior* rule without explicitly passing on the correctness of the method by which it was adopted. *NLRB* v. *Hanes Hosiery Division,* 384 F. 2d 188 (C. A. 4th Cir. 1967); *NLRB* v. *Rohlen,* 385 F. 2d 52 (C. A. 7th Cir. 1967). After our grant of certiorari in the present case, three more courts of appeals explicitly upheld the *Excelsior* rule and the procedure by which it was adopted, *NLRB* v. *Beech-Nut Life Savers, Inc.,* 406 F. 2d 253 (C. A. 2d Cir. 1968); *British Auto Parts, Inc.* v. *NLRB,* 405 F. 2d 1182 (C. A. 9th Cir. 1968); *NLRB* v. *Q-T Shoe Mfg. Co.,* 409 F. 2d 1247 (C. A. 3d Cir. 1969); and the Fifth Circuit reaffirmed its earlier holding in *Howell Refining Co., Groendyke Transport, Inc.* v. *Davis,* 406 F. 2d 1158 (1969).

Specifically, the Board purported to establish "a requirement that will be applied in all election cases. That is, within 7 days after the Regional Director has approved a consent-election agreement entered into by the parties . . . , or after the Regional Director or the Board has directed an election . . . , the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed." *Id.*, at 1239–1240.

Section 6 of the National Labor Relations Act empowers the Board "to make . . . , in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act." 29 U. S. C. § 156. The Administrative Procedure Act contains specific provisions governing agency rule making, which it defines as "an agency statement of general or particular applicability and future effect," 5 U. S. C. § 551 (4).[2] The Act requires, among other things, publication in the Federal Register of notice of proposed rule making and of hearing; opportunity to be heard; a statement in the rule of its basis and purposes; and publication in the Federal Register of the rule as adopted. See 5 U. S. C. § 553. The Board asks us to hold that it has discretion to promulgate new rules in adjudicatory proceedings, without complying with the requirements of the Administrative Procedure Act.

The rule-making provisions of that Act, which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application. See H. R. Rep. No. 1980, 79th Cong., 2d Sess., 21–26 (1946); S. Rep. No. 752, 79th Cong., 1st Sess., 13–16 (1945). They may not be avoided by the process of making rules in the course of adjudicatory proceedings. There is no warrant in law for the Board to replace the statutory scheme with a rule-making procedure of its own invention. Apart from the fact that the device fashioned by the Board does not comply with statutory command, it obviously falls short of the substance of the requirements of the Administrative Procedure Act. The "rule" created in *Excelsior* was not published in the Federal Register, which is the statutory and accepted means of giving notice of a rule as adopted; only selected organizations were given notice of the "hearing," whereas notice in the Federal Register would have been general in character; under the Administrative Procedure Act, the terms or substance of the rule would have to be stated in the notice of hearing, and all interested parties would have an opportunity to participate in the rule making.

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[2] We agree with the opinion of Chief Judge Aldrich below that the *Excelsior* rule involves matters of substance and that it therefore does not fall within any of the Act's exceptions. See 5 U. S. C. § 553 (b)(A).

The Solicitor General does not deny that the Board ignored the rule-making provisions of the Administrative Procedure Act.[3] But he appears to argue that *Excelsior's* command is a valid substantive regulation, binding upon this respondent as such, because the Board promulgated it in the *Excelsior* proceeding, in which the requirements for valid adjudication had been met. This argument misses the point. There is no question that, in an adjudicatory hearing, the Board could validly decide the issue whether the employer must furnish a list of employees to the union. But that is not what the Board did in *Excelsior*. The Board did not even apply the rule it made to the parties in the adjudicatory proceeding, the only entities that could properly be subject to the order in that case. Instead, the Board purported to make a rule: *i. e.*, to exercise its quasi-legislative power.

Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein. See H. Friendly, The Federal Administrative Agencies 36–52 (1962).[4] They generally provide a guide to action that the agency may be expected to take in future cases. Subject to the qualified role of *stare decisis* in the administrative process, they may serve as precedents. But this is far from saying, as the Solicitor General suggests, that commands, decisions, or policies announced in adjudication are "rules" in the sense that they must, without more, be obeyed by the affected public.

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[3] The Board has never utilized the Act's rule-making procedures. It has been criticized for contravening the Act in this manner. See, *e. g.*, 1 K. Davis, Administrative Law Treatise § 6.13 (Supp. 1965); Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L. J. 729 (1961).

[4] The Solicitor General argues that this Court has previously approved "rules" articulated by the Board in the adjudication of particular cases without questioning the propriety of that procedure. He cites *Republic Aviation Corp.* v. *NLRB,* 324 U. S. 793 (1945); *NLRB* v. *A. J. Tower Co.,* 329 U. S. 324 (1946); *NLRB* v. *Seven-Up Bottling Co.,* 344 U. S. 344 (1953); and *Brooks* v. *NLRB,* 348 U. S. 96 (1954). In none of these cases has this Court ruled upon or sanctioned the exercise of quasi-legislative power—*i. e.,* rule making—without compliance with § 6 of the NLRA and the rule-making provisions of the Administrative Procedure Act.

In the present case, however, the respondent itself was specifically directed by the Board to submit a list of the names and addresses of its employees for use by the unions in connection with the election.[5] This direction, which was part of the order directing that an election be held, is unquestionably valid. See, *e. g., NLRB* v. *Waterman S. S. Co.,* 309 U. S. 206, 226 (1940). Even though the direction to furnish the list was followed by citation to "*Excelsior Underwear Inc.,* 156 NLRB No. 111," it is an order in the present case that the respondent was required to obey. Absent this direction by the Board, the respondent was under no compulsion to furnish the list because no statute and no validly adopted rule required it to do so.

Because the Board in an adjudicatory proceeding directed the respondent itself to furnish the list, the decision of the Court of Appeals for the First Circuit must be reversed.[6]

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[5] In his Decision and Direction of Election, the Regional Director ordered that "[a]n election eligibility list, containing the names and addresses of all the eligible voters, must be filed with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. . . ."

[6] MR. JUSTICE HARLAN's dissent argues that because the Board improperly relied upon the *Excelsior* "rule" in issuing its order, we are obliged to remand. He relies on *SEC* v. *Chenery Corp.,* 318 U. S. 80 (1943). To remand would be an idle and useless formality. *Chenery* does not require that we convert judicial review

II.

The respondent also argues that it need not obey the Board's order because the requirement of disclosure of employees' names and addresses is substantively invalid. This argument lacks merit. The objections that the respondent raises to the requirement of disclosure were clearly and correctly answered by the Board in its *Excelsior* decision. All of the United States Courts of Appeals that have passed on the question have upheld the substantive validity of the disclosure requirement,[7] and the court below strongly intimated a view that the requirement was substantively a proper one, 397 F. 2d, at 396.

We have held in a number of cases that Congress granted the Board a wide discretion to ensure the fair and free choice of bargaining representatives. See, *e. g., NLRB* v. *Waterman S. S. Co., supra,* at 226; *NLRB* v. *A. J. Tower Co.,* 329 U. S. 324, 330 (1946). The disclosure requirement furthers this objective by encouraging an informed employee electorate and by allowing unions the right of access to employees that management already possesses. It is for the Board and not for this Court to weigh against this interest the asserted interest of employees in avoiding the problems that union solicitation may present.

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of agency action into a ping-pong game. In *Chenery,* the Commission had applied the wrong standards to the adjudication of a complex factual situation, and the Court held that it would not undertake to decide whether the Commission's result might have been justified on some other basis. Here, by contrast, the substance of the Board's command is not seriously contestable. There is not the slightest uncertainty as to the outcome of a proceeding before the Board, whether the Board acted through a rule or an order. It would be meaningless to remand.

[7] See *NLRB* v. *J. P. Stevens & Co.,* 409 F. 2d 1207 (C. A. 4th Cir. 1969), and the cases cited in n. 1, *supra.*

III.

The respondent contends that even if the disclosure requirement is valid, the Board lacks power to enforce it by subpoena. Section 11 (1) of the National Labor Relations Act provides that the Board shall have access to "any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question," and empowers the Board to issue subpoenas "requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation." Section 11 (2) gives the district courts jurisdiction, upon application by the Board, to issue an order requiring a person who has refused to obey the Board's subpoena "to appear before the Board . . . there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question . . . ." 29 U. S. C. §§ 161 (1), (2).

The respondent takes the position that these statutory provisions do not give the Board authority to subpoena the lists here in question because they are not "evidence" within the meaning of the statutory language. The District Court held, however, that "in the context of § 11 of the Act, 'evidence' means not only proof at a hearing but also books and records and other papers which will be of assistance to the Board in conducting a particular investigation."[8] The courts of appeals that have passed on the question have construed the term "evidence" in a similar manner. *NLRB* v. *Hanes Hosiery Division*, 384 F. 2d 188, 191–192 (C. A. 4th Cir. 1967). See *NLRB* v. *Rohlen*, 385 F. 2d 52, 55–58 (C. A. 7th Cir. 1967); *NLRB* v. *Beech-Nut Life Savers, Inc.*, 406 F. 2d 253, 259 (C. A. 2d Cir. 1968); *British Auto Parts, Inc.* v.

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[8] 270 F. Supp., at 285. The Court of Appeals did not reach the issue whether the Board could subpoena the lists in question.

NLRB, 405 F. 2d 1182, 1184 (C. A. 9th Cir. 1968); *NLRB* v. *Q-T Shoe Mfg. Co.*, 409 F. 2d 1247 (C. A. 3d Cir. 1969). We agree that the list here in issue is within the scope of § 11 so that the Board's subpoena power may be validly exercised.

The judgment of the Court of Appeals is reversed, and the case is remanded to the District Court with directions to reinstate its judgment.

It is so ordered.

MR. JUSTICE BLACK, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, concurring in the result.

I agree with Parts II and III of the prevailing opinion of MR. JUSTICE FORTAS, holding that the *Excelsior* requirement[1] that an employer supply the union with the names and addresses of its employees prior to an election is valid on its merits and can be enforced by a subpoena. But I cannot subscribe to the criticism in that opinion of the procedure followed by the Board in adopting that requirement in the *Excelsior* case, 156 N. L. R. B. 1236 (1966). Nor can I accept the novel theory by which the opinion manages to uphold enforcement of the *Excelsior* practice in spite of what it considers to be statutory violations present in the procedure by which the requirement was adopted. Although the opinion is apparently intended to rebuke the Board and encourage it to follow the plurality's conception of proper administrative practice, the result instead is to free the Board from all judicial control whatsoever regarding compliance with procedures specifically required by applicable federal statutes such as the National Labor Relations Act, 29 U. S. C. § 151 *et seq.*, and the Administrative Procedure Act, 5 U. S. C. § 551 *et seq.* Apparently, under the prevailing opinion, courts must enforce any requirement announced in a purported "adjudication" even if it clearly was not adopted as an incident to the decision of a case before the agency, and must enforce "rules" adopted in a purported "rule making" even if the agency materially violated the specific requirements that Congress has directed for such proceedings in the Administrative Procedure Act. I for one would not give judicial sanction to any such illegal agency action.

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[1] This requirement first announced in the *Excelsior* case, 156 N. L. R. B. 1236 (1966), has often been referred to by the Board, the lower courts, and the commentators as "the *Excelsior* rule." I understand the use of the word "rule" in this context to imply simply that the requirement is a rule of law such as would be announced in a court opinion and not necessarily that it is the kind of "rule" required to be promulgated in accordance with the "rule-making" procedures of the Administrative Procedure Act. For the sake of clarity, however, I have chosen in this opinion to avoid use of the word "rule" when referring to the procedure required by the *Excelsior* decision.

In the present case, however, I am convinced that the *Excelsior* practice was adopted by the Board as a legitimate incident to the adjudication of a specific case before it, and for that reason I would hold that the Board properly followed the procedures applicable to "adjudication" rather than "rule making." Since my reasons for joining in reversal of the Court of Appeals differ so substantially from those set forth in the prevailing opinion, I will spell them out at some length.

Most administrative agencies, like the Labor Board here, are granted two functions by the legislation creating them: (1) the power under certain conditions to make rules having the effect of laws, that is, generally speaking, quasi-legislative power; and (2) the power to hear and adjudicate particular controversies, that is quasi-judicial power. The line between these two functions is not always a clear one and in fact the two functions merge at many points. For example, in exercising its quasi-judicial function an agency must frequently decide controversies on the basis of new doctrines, not theretofore applied to a specific problem, though drawn to be sure from broader principles reflecting the purposes of the statutes involved and from the rules invoked in dealing with related problems. If the agency decision reached under the adjudicatory power becomes a precedent, it guides future conduct in much the same way as though it were a new rule promulgated under the rule-making power, and both an adjudicatory order and a formal "rule" are alike subject to judicial review. Congress gave the Labor Board both of these separate but almost inseparably related powers.[2] No language in the National Labor Relations Act requires that the grant or the exercise of one power was intended to exclude the Board's use of the other.

Nor does any language in the Administrative Procedure Act require such a conclusion. The Act does specify the procedure by which the rule-making power is to be exercised, requiring publication of notice for the benefit of interested parties and provision of an opportunity for them to be heard, and, after establishment of a rule as provided in the Act, it is then to be published in the Federal Register. Congress had a laudable purpose in prescribing these requirements, and it was evidently contemplated that administrative agencies like the Labor Board would follow them when setting out to announce a new rule of law to govern parties in the future. In this same statute, however, Congress also conferred on the affected administrative agencies the power to proceed by adjudication, and Congress specified a distinct procedure by which this adjudicatory power is to be exercised.[3] The Act defines "adjudication" as

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[2] See National Labor Relations Act §§ 6, 9 (c) (1), 10; 29 U. S. C. §§ 156, 159 (c) (1), 160.

[3] The procedure to be followed in "adjudication," which includes notice of the issues, an opportunity for responsive pleadings, a hear-

"agency process for the formulation of an order," and "order" is defined as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U. S. C. §§ 551 (7), (6). Thus, although it is true that the adjudicatory approach frees an administrative agency from the procedural requirements specified for rule making, the Act permits this to be done whenever the action involved can satisfy the definition of "adjudication" and then imposes separate procedural requirements that must be met in adjudication. Under these circumstances, so long as the matter involved can be dealt with in a way satisfying the definition of either "rule making" or "adjudication" under the Administrative Procedure Act, that Act, along with the Labor Relations Act, should be read as conferring upon the Board the authority to decide, within its informed discretion, whether to proceed by rule making or adjudication. Our decision in *SEC* v. *Chenery Corp.,* 332 U. S. 194 (1947), though it did not involve the Labor Board or the Administrative Procedure Act, is nonetheless equally applicable here. As we explained in that case, "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *Id.,* at 203.

In the present case there is no dispute that all the procedural safeguards required for "adjudication" were fully satisfied in connection with the Board's *Excelsior* decision, and it seems plain to me that that decision did

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ing, and decision, is specified in 5 U. S. C. §§ 554, 556, and 557. The Administrative Procedure Act expressly exempts proceedings for "the certification of worker representatives" from these requirements, 5 U. S. C. §§ 554 (a)(6), 556 (a), 557 (a), and these proceedings are therefore governed only by the requirements specified in the National Labor Relations Act, 29 U. S. C. § 151 *et seq.*

constitute "adjudication" within the meaning of the Administrative Procedure Act, even though the requirement was to be prospectively applied. See *Great Northern R. Co.* v. *Sunburst Co.,* 287 U. S. 358 (1932). The Board did not abstractly decide out of the blue to announce a brand new rule of law to govern labor activities in the future, but rather established the procedure as a direct consequence of the proper exercise of its adjudicatory powers. Sections 9 (c)(1) and (2) of the Labor Relations Act empower the Board to conduct investigations, hold hearings, and supervise elections to determine the exclusive bargaining representative that the employees wish to represent them. This is a key provision of the plan Congress adopted to settle labor quarrels that might interrupt the free flow of commerce. A controversy arose between the Excelsior Company and its employees as to the bargaining agent the employees desired to act for them. The Board's power to provide the procedures for the election was invoked, an election was held, and the losing unions sought to have that election set aside. Undoubtedly the Board proceeding for determination of whether to confirm or set aside that election was "agency process for the formulation of an order" and thus was "adjudication" within the meaning of the Administrative Procedure Act.

The prevailing opinion seems to hold that the *Excelsior* requirement cannot be considered the result of adjudication because the Board did not apply it to the parties in the *Excelsior* case itself, but rather announced that it would be applied only to elections called 30 days after the date of the *Excelsior* decision. But the *Excelsior* order was nonetheless an inseparable part of the adjudicatory process. The principal issue before the Board in the *Excelsior* case was whether the election should be set aside on the ground, urged by the unions, that the employer had refused to make the employee lists available to them. See 156 N. L. R. B., at 1236–1238. The Board decided that the election involved there should not be set aside and thus rejected the contention of the unions. In doing so, the Board chose to explain the reasons for its rejection of their claim, and it is this explanation, the Board's written opinion, which is the source of the *Excelsior* requirement. The Board's opinion should not be regarded as any less an appropriate part of the adjudicatory process merely because the reason it gave for rejecting the unions' position was not that the Board disagreed with them as to the merits of the disclosure procedure but rather, see 156 N. L. R. B., at 1239, 1240, n. 5, that while fully agreeing that disclosure should be required, the Board did not feel that it should upset the Excelsior Company's justified reliance on previous refusals to compel disclosure by setting aside this particular election.

Apart from the fact that the decisions whether to accept a "new" requirement urged by one party and, if so, whether to apply it retroactively to the other party are inherent parts of the adjudicatory process, I think the opposing theory accepted by the Court of Appeals and by the prevailing opinion today is a highly impractical one. In effect, it would require an agency like the Labor Board to proceed by adjudication only when it could decide, *prior* to adjudicating a particular case, that any new practice to be adopted would be applied retroactively. Obviously, this decision cannot properly be made until all the issues relevant to adoption of the practice are fully considered in connection with the final decision of that case. If the Board were to decide, after careful evaluation of all the arguments presented to it in the adjudicatory proceeding, that it might be fairer to apply the practice only prospectively, it would be faced with the unpleasant choice of either starting all over again to evaluate the merits of the question, this time in a "rule-making" proceeding, or overriding the considerations of fairness and applying its order retroactively anyway, in order to preserve the validity of the new practice and avoid duplication of effort. I see no good reason to impose any such inflexible requirement on the administrative agencies.

For all of the foregoing reasons I would hold that the Board acted well within its discretion in choosing to proceed as it did, and I would reverse the judgment of the Court of Appeals on this basis.

MR. JUSTICE DOUGLAS, dissenting.

The Administrative Procedure Act, 5 U. S. C. § 553 (b) provides that general notice "of proposed rule making" shall be published in the Federal Register. Public participation—in essence a hearing—is provided, § 553 (c). And "interested" persons are given the right to petition for the issuance, amendment, or repeal of a rule, § 553 (e).

In *Excelsior Underwear Inc.*, 156 N. L. R. B. 1236, the Board in 1966 decided (1) that an employer would be required to furnish the Regional Director, prior to the conducting of a representation election, the names and addresses of the eligible voters, which list would then be made available to all contestants in the election, but (2) that this requirement would apply only prospectively, to all elections directed or consented to subsequent to 30 days after the date of its decision there.

The notice and hearing procedure prescribed by § 553 (b) was not followed; and in this case, an election was directed seven months after the *Excelsior* decision, the Board applying the *Excelsior* rule.

I am willing to assume that, if the Board decided to treat each case on its special facts and perform its adjudicatory function in the conventional way, we should have no difficulty in affirming its action. The difficulty is that it chose a different course in the *Excelsior* case and, having done so, it should be bound to follow the procedures prescribed in the Act as my Brother HARLAN has outlined them. When we hold otherwise, we let the Board "have its cake and eat it too."

The Committee reports make plain that the Act "provides quite different procedures for the 'legislative' and 'judicial' functions of administrative agencies." S. Rep. No. 752, 79th Cong., 1st Sess., 7; H. R. Rep. No. 1980, 79th Cong., 2d Sess., 17.

Section 553 (b)(3) provides in part:

> "Except when notice or hearing is required by statute, this subsection does not apply—
>
> "(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."

We need not stop to inquire what the word "procedure" in that context embraces. For § 553 (d) provides, with exceptions not material[1] here that:

> "The required publication or service of a substantive rule shall be made not less than 30 days before its effective date . . . ."

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[1] The rule-making provision does not apply to

"(1) a military or foreign affairs function of the United States; or

"(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 5 U. S. C. § 553 (a).

These exceptions exclude, *inter alia,* the National Forest Service, the National Park System, the Bureau of Land Management, and other agencies dealing with "public property" such as the Interior Department and its leases of off-shore oil properties.

For a compilation of federal agency rules on rule making see J. Pike & H. Fischer, Administrative Law (2d series 1952).

The Board apparently decided the *Excelsior* case with § 553 (d) in mind, for it made the proposed new rule effective after 30 days. The House report states that § 553 (d) (which was § 4 (c) in its draft) "does not provide procedures alternative to notice and other public proceedings required by the prior sections." *Id.,* at 25. And that report added, "It will afford persons affected a reasonable time to prepare for the effective date of a rule or rules or to take any other action which the issuance of rules may prompt." *Ibid.* And see S. Rep., *supra,* at 15.

The "substantive" rules described by § 553 (d) may possibly cover "adjudications," even though they represent performance of the "judicial" function. But it is no answer to say that the order under review was "adjudicatory." For as my Brother HARLAN says, an agency is not adjudicating when it is making a rule to fit future cases. A rule like the one in *Excelsior* is designed to fit all cases at all times. It is not particularized to special facts. It is a statement of far-reaching policy covering all future representation elections.

It should therefore have been put down for the public hearing prescribed by the Act.

The rule-making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that is forthcoming. It gives an opportunity for persons affected to be heard. Recently the proposed Rules of the Federal Highway Administration governing the location and design of freeways, 33 Fed. Reg. 15663, were put down for a hearing; and the Governor of every State appeared or sent an emissary. The result was a revision of the Rules before they were promulgated. 34 Fed. Reg. 727.

That is not an uncommon experience. Agencies discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice. See H. Friendly, The Federal Administrative Agencies 45 (1962).

This is a healthy process that helps make a society viable. The multiplication of agencies and their growing power make them more and more remote from the people affected by what they do and make more likely the arbitrary exercise of their powers. Public airing of problems through rule making makes the bureaucracy more responsive to public needs and is an important brake on the growth of absolutism in the regime that now governs all of us.

Many federal agencies touch on numerous aspects of the lives of the poor. Rule making for this group is discussed in Bonfield, Representation for the Poor in Federal Rulemaking, 67 Mich. L. Rev. 511, 512 (1969):

> "An agency promulgating rules affecting the poor cannot assume that it automatically knows what is best for such people. Government administrators are usually persons with middle-class backgrounds, experiences, and associations; therefore, they tend to have middle-class viewpoints, orientations, and understandings. This means that the personnel of federal agencies may be expected to reflect more accurately the interests of the affluent than those of the economically underprivileged. Consequently, there is a special reason for concern when, as is now the case, the interests of poor people are inadequately represented in the rulemaking process."

While that suggestion may not be relevant to the present labor-management area and the sophisticated opponents with which this case is concerned, it does illustrate that when we are lax and allow federal agencies to play fast and loose with rule making, we set a precedent with dangerous repercussions.

It has been stated that "the survival of a questionable rule seems somewhat more likely when it is submerged in the facts of a given case" than when rule making is used. See Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921, 946–947 (1965). Moreover, "agencies appear to be freer to disregard their own prior decisions than they are to depart from their regulations." *Id.*, at 947. Failure to make full use of rule-making power is attributable at least in part "to administrative inertia and reluctance to take a clear stand." *Id.*, at 972.

Rule making is no cure-all; but it does force important issues into full public display and in that sense makes for more responsible administrative action.

I would hold the agencies governed by the rule-making procedure strictly to its requirements and not allow them to play fast and loose as the National Labor Relations Board apparently likes to do.[2]

As stated by the Court of Appeals, the procedure used in the *Excelsior* case plainly flouted the Act:

> "Recognizing the problem to be one affecting more than just the parties before it, the Board chose to solicit the assistance of selected amici curiae, and, ultimately, to establish a rule which not only did not apply to the parties before it, but did not take effect for thirty days. In so doing we consider that

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[2] "The NLRB has never used its rule-making power; it misuses the methods of adjudication for making rules, and it uses press releases not published in the Federal Register, for announcing policies that ought to be embodied in formal rules. It seems to be violating § 3 and § 4 of the Administrative Procedure Act, and the result in some instances is serious injustice." 1 K. Davis, Administrative Law Treatise § 6.13 (Supp. 1965). And see Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L. J. 729 (1961).

> the Board, to put it bluntly, designed its own rule-making procedure, adopting such part of the Congressional mandate as it chose, and rejecting the rest." 397 F. 2d 394, 396–397.

I would affirm the judgment.

MR. JUSTICE HARLAN, dissenting.

The language of the Administrative Procedure Act does not support the Government's claim that an agency is "adjudicating" when it announces a rule which it refuses to apply in the dispute before it. The Act makes it clear that an agency "adjudicates" only when its procedures result in the "formulation of an *order*." 5 U. S. C. § 551 (7). (Emphasis supplied.) An "order" is defined to include "the whole or a *part* of a final disposition . . . of an agency *in a matter other than rule making* . . . ." 5 U. S. C. § 551 (6). (Emphasis supplied.) This definition makes it apparent that an agency is not adjudicating when it is making a rule, which the Act defines as "an agency statement of general or particular applicability and *future effect* . . . ." 5 U. S. C. § 551 (4). (Emphasis supplied.) Since the Labor Board's *Excelsior* rule was to be effective only 30 days after its promulgation, it clearly falls within the rule-making requirements of the Act.[1]

Nor can I agree that the natural interpretation of the statute should be rejected because it requires the agency to choose between giving its rules immediate effect or initiating a separate rule-making proceeding. An agency chooses to apply a rule prospectively only because it represents such a departure from pre-existing understandings that it would be unfair to impose the rule upon the parties in pending matters. But it is precisely in these situations, in which established patterns of conduct are revolutionized, that rule-making procedures perform the vital functions that my Brother DOUGLAS describes so well in a dissenting opinion with which I basically agree.

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[1] For the reasons advanced by Chief Judge Aldrich in his opinion below, 397 F. 2d 394, I think it clear that the *Excelsior* rule involves matters of substance and not procedure, and so does not fall within the exception created by 5 U. S. C. § 553 (b)(A) of the Act.

Given the fact that the Labor Board has promulgated a rule in violation of the governing statute, I believe that there is no alternative but to affirm the judgment of the Court of Appeals in this case. If, as the plurality opinion suggests, the NLRB may properly enforce an invalid rule in subsequent adjudications, the rule-making provisions of the Administrative Procedure Act are completely trivialized. Under today's prevailing approach, the agency may evade the commands of the Act whenever it desires and yet coerce the regulated industry into compliance. It is no answer to say that "respondent was under no compulsion to furnish the list because no statute and no validly adopted rule required it to do so," *ante,* at 766, when the Labor Board was threatening to issue a subpoena which the courts would enforce. In what other way would the administrative agency compel obedience to its invalid rule?

One cannot always have the best of both worlds. Either the rule-making provisions are to be enforced or they are not. Before the Board may be permitted to adopt a rule that so significantly alters pre-existing labor-management understandings, it must be required to conduct a satisfactory rule-making proceeding, so that it will have the benefit of wide-ranging argument before it enacts its proposed solution to an important problem.

In refusing to adopt this position, the prevailing opinion not only undermines the Administrative Procedure Act, but also compromises the most basic principles governing judicial review of agency action established in our past decisions. This Court's landmark opinion in *SEC* v. *Chenery Corp.*, 318 U. S. 80, 94 (1943), makes it clear that we are obliged to remand a case if the agency has relied upon an improper reason to justify its action:

> "If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law. In either event the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."

Chenery's teachings are applicable here. The Regional Office that issued the order under review refused to consider the merits of the arguments against the *Excelsior* rule which were raised by Wyman-Gordon on the ground that they had been rejected by the Board in the *Excelsior* case itself:

> "[I]t is well known that *Excelsior* issued only after oral argument and briefs, including *amicus curiae* briefs by interested parties. The Board has considered arguments such as those made here and nevertheless established the requirement embodied in *Excelsior* and the undersigned [Acting Regional Director] is bound by it." Appendix 33.

The Board denied review of this decision on the ground that "it raises no substantial issues warranting review." Appendix 35.

Since the major reason the Board has given in support of its order is invalid, *Chenery* requires remand. See also *Bell* v. *United States,* 366 U. S. 393, 412–413 (1961); *Burlington Truck Lines* v. *United States,* 371 U. S. 156, 167–168 (1962); cf. *Phelps Dodge Corp.* v. *NLRB,* 313 U. S. 177, 196–197 (1941). The prevailing opinion explains its departure from our leading decisions in this area on the ground that: "There is not the slightest uncertainty as to the outcome of [this] proceeding" on remand. *Ante,* n. 6, at 767. I can perceive no justification whatever for this assertion. Since the *Excelsior* rule was invalidly promulgated, it is clear that, at a minimum, the Board is obliged on remand to recanvass all of the competing considerations before it may properly announce its decision in this case.[2] We cannot know what the outcome of such a reappraisal will be. Surely, it cannot be stated with any degree of certainty that the Board will adopt precisely the same solution as the one which was embraced in *Excelsior.* The plurality simply usurps the function of the National Labor Relations Board when it says otherwise.

I would affirm the judgment of the Court of Appeals.

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[2] As I have indicated, *supra,* at 781, I would go further and require the Board to initiate a new rule-making proceeding where, as here, it has previously recognized that the proposed new rule so departs from prior practices that it cannot fairly be applied retroactively. In the absence of such a proceeding, the administrative agency must be obliged to follow its earlier decisions which did not require employers to furnish *Excelsior* lists to unions during organizing campaigns.

UNITED STATES *v.* AN ARTICLE OF DRUG . . . BACTO-UNIDISK . . . .

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 343. Argued January 23, 1969.—Decided April 28, 1969.

Antibiotic sensitivity disc used as laboratory screening test to help determine proper antibiotic drug to administer to patients *held* not merely a "device" but a "drug" within definition of § 201 (g)(1)(B) of the Federal Food, Drug, and Cosmetic Act and thus subject to pre-market clearance regulations issued pursuant to § 507 of the Act. Pp. 791–801.

392 F. 2d 21, reversed.

Lawrence G. Wallace argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg, Ronald L. Gainer,* and *William W. Goodrich.*

Edward Brown Williams argued the cause and filed a brief for respondent.

MR. CHIEF JUSTICE WARREN delivered the opinion of the court.

At issue here is the scope of the statutory definition of drug contained in the Federal Food, Drug, and Cosmetic Act and the extent of the Secretary of Health, Education, and Welfare's regulatory authority under that definition. The specific item involved in this definitional controversy is a laboratory aid known as an antibiotic sensitivity disc, used as a screening test for help in determining the proper antibiotic drug to administer to patients. If the article is a "drug" within the general definition of § 201 of the Federal Food, Drug, and Cosmetic Act (52 Stat. 1040, 21 U. S. C. § 321 (1964 ed., Supp. II)), then the Secretary can subject it to pre-market clearance regulations promulgated pursuant to § 507 of the Act (21 U. S. C. § 357). Section 507 authorizes the Secretary to require batch certification of any antibiotic product which also meets the general drug definition of § 201. If, on the other hand, the article is merely a "device" under the Act, it is subject only to the misbranding and adulteration proscriptions of the Act and does not have to be pre-tested before marketing; and, of course, if the disc does not fall under either definition, the Act itself is totally inapplicable.

When the discs were marketed without complying with the certification regulations of the Secretary, the Government condemned them pursuant to § 334 of the Act (21 U. S. C. § 331) on the assumption that the discs were drugs and thus validly subject to pre-market regulation. In this action following the condemnation, however, the United States District Court for the Eastern District of Michigan held that the discs were not drugs within the meaning of the Act, suggesting that, if anything, they were devices. It therefore ruled that, since pre-market clearance was not required or authorized, the seizure was improper. The Court of Appeals for the Sixth Circuit affirmed on the same reasoning. We reverse.

I.

Some background information about the development of the discs and the controlling legislation is necessary for an understanding of the determinations made by the Secretary and the courts below. Various antibiotics, known more commonly as "wonder drugs" under such familiar names as penicillin, aureomycin, terramycin, tetracycline, and streptomycin, have proved very useful since World War II in treating numerous infectious diseases.[1] Produced biologically, however, these drugs tend to vary greatly in their quality and potency unless developed, and thereafter tested, under very carefully controlled conditions. Consequently,[2] Congress enacted § 507 of the Food, Drug, and Cosmetic Act, directing the Secretary of Health, Education, and Welfare to promulgate regulations establishing such standards of identity, potency, quality, and purity as necessary to ensure the "safety" and "efficacy" of those antibiotics. At present, more than 30 antibiotic drugs are listed (21 CFR § 145.3) with accompanying regulations covering more than 700 pages in the Code of Federal Regulations (21 CFR §§ 141.1–148z.4).

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[1] See generally L. Goodman & A. Gilman, The Pharmacological Basis of Therapeutics (3d ed., 1965).

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[2] See H. R. Rep. No. 702, 79th Cong., 1st Sess. (1945). Section 507, as set forth in 21 U. S. C. § 357, reads as follows:

"(a) The Secretary of Health, Education, and Welfare, pursuant to regulations promulgated by him, shall provide for the certification of batches of drugs composed wholly or partly of any kind of penicillin, streptomycin, chlortetracycline, chloramphenicol, bacitracin, or any other antibiotic drug, or any derivative thereof. A batch of any such drug shall be certified if such drug has such characteristics of identity and such batch has such characteristics of strength, quality, and purity, as the Secretary prescribes in such regulations as necessary to adequately insure safety and efficacy of use, but shall not otherwise be certified. Prior to the effective date of such regulations the Secretary, in lieu of certification, shall issue a release for any batch which, in his judgment, may be released without risk as to the safety and efficacy of its use. Such release shall prescribe the date of its expiration and other conditions under which it shall cease to be effective as to such batch and as to portions thereof. For purposes of this section and of section 352 (*l*) of this title, the term 'antibiotic drug' means any drug intended for use by man containing any quantity of any chemical substance which is produced by a microorganism and which has the capacity to inhibit or destroy microorganisms in dilute solution (including the chemically synthesized equivalent of any such substance).

"(b) Regulations providing for such certifications shall contain such provisions as are necessary to carry out the purposes of this section, including provisions prescribing (1) standards of identity and of strength, quality, and purity; (2) tests and methods of assay to determine compliance with such standards; (3) effective periods for certificates, and other conditions under which they shall cease to be effective as to certified batches and as to portions thereof; (4) administration and procedure; and (5) such fees, specified in such regulations, as are necessary to provide, equip, and maintain an adequate certification service. Such regulations shall prescribe only such tests and methods of assay as will provide for certification or rejection within the shortest time consistent with the purposes of this section."

With the proliferation of the various types of antibiotics, doctors found a need for a screening test to help choose which antibiotic to use in treating a particular infection. A diffusion test, using antibiotic sensitivity discs like the one in question here, soon became a widely employed screening method.[3] In this test, a round paper disc, which has been impregnated with a specific antibiotic, is placed in contact with sample cultures, or isolates, of a patient's virus, grown in a special culture medium (agar) from a specimen of the patient's fluid (blood, spinal fluid, sputum, urine, etc.). In those places impregnated with an antibiotic to which the patient's infection is sensitive, no new isolate will grow, leaving a clear area (an "inhibition zone"); in those places impregnated with a drug to which the infection is resistant, the isolate will grow, leaving no clear area. The disc is used, in conjunction with a patient's specimen, in laboratory work exclusively, and never comes in contact with any part of the patient's body itself.

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[3] See generally Bauer, Kirby, Sherris, & Turck, Antibiotic Susceptibility Testing by a Standardized Single Disk Method, 45 American Journal of Clinical Pathology 493 (1966); Petersdorf & Sherris, Methods and Significance of In Vitro Testing of Bacterial Sensitivity to Drugs, 39 American Journal of Medicine 766 (1965); Gould, The Laboratory Control of Antibiotic Therapy, 3 Chemotherapia 477 (1961); Second Report of the Expert Committee on Antibiotics, Standardization of Methods for Conducting Microbic Sensitivity Tests, World Health Organization Technical Report Series No. 210, pp. 12–17 (1961).

The discs had been in general use for some four years when, in 1960, the Secretary of Health, Education, and Welfare determined to regulate them pursuant to § 507. After notice and an opportunity for public participation, the Commissioner of Food and Drugs, under authority delegated by the Secretary, promulgated regulations requiring pre-clearance, batch-testing, and certification of antibiotic sensitivity discs (25 Fed. Reg. 9369). The Commissioner's action, the regulations noted, followed "numerous complaints by the medical profession, hospitals, and laboratory technicians" and a resulting extensive survey of the use of the discs. That study found the discs unreliable in their statements of potency with resulting loss of safety and efficacy, and thus found it "vital for the protection of the public health" to adopt the regulations (25 Fed. Reg. 9370).

This case arose in May 1962 as an *in rem* seizure proceeding against an interstate shipment of a number of cases of sensitivity discs, manufactured by Difco Laboratories, Inc., under the trade name of "Bacto-Unidisk." In condemning the product pursuant to § 301 *et seq.* of the Food, Drug, and Cosmetic Act, the United States claimed, *inter alia,* that the product, as a "drug" within the meaning of the Act, had not been certified nor exempted from certification as required by § 507 (21 U. S. C. § 357) and the regulations thereunder and was therefore misbranded under § 502 (21 U. S. C. § 352).[4] The seizure was proper only if the Secretary's

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[4] Section 502, as set forth in 21 U. S. C. § 352, reads, in part, as follows:

"A drug or device shall be deemed to be misbranded—

. . . . .

"(*l*) If it is, or purports to be, or is represented as a drug composed wholly or partly of any kind of penicillin, streptomycin, chlortetracycline, chloramphenicol, bacitracin, or any other antibiotic drug, or any derivative thereof, unless (1) it is from a batch with respect to which a certificate or release has been issued pursuant regulations subjecting the discs to the pre-market clearance requirements were authorized by the Act. Since the scope of the Secretary's pre-market regulatory power over antibiotic drugs under § 507 depends ultimately on the Act's general definition of "drug" in § 201 (g), the validity of the disc regulations allegedly violated turned on the coverage of the drug definition:

> "For the purposes of this chapter—
>
> . . . . .
>
> "(g)(1) The term 'drug' means (A) articles recognized in the official United States Pharmacopoeia, official Homoeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and (B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (C) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (D) articles intended for use as a component of any article specified in clauses (A), (B), or (C) of this paragraph; but does not include devices or their components, parts, or accessories." 21 U. S. C. § 321 (1964 ed., Supp. II).

If, on the other hand, the product was a "device," only the misbranding, adulteration, and labeling provisions of §§ 501 and 502 applied, and the Secretary's disc certification regulations were invalidly promulgated. Although a "device" expressly cannot be a "drug" under the last phrase of the drug definition above, a device is given almost a parallel definition in § 201 (h):

> "The term 'device' . . . means instruments, apparatus, and contrivances, including their components,

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to section 357 of this title, and (2) such certificate or release is in effect with respect to such drug: *Provided,* That this subsection shall not apply to any drug or class of drugs exempted by regulations promulgated under section 357 (c) or (d) of this title."

> parts, and accessories, intended (1) for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or (2) to affect the structure or any function of the body of man or other animals." 21 U. S. C. § 321 (h).

Finally, it was established at trial that of the various definitions given above, the operative ones in this case were § 201 (g)(1)(B) of the drug provision and § 201 (h)(1) of the parallel device definition;[5] the essential question underlying the validity of the regulations, then, was whether the Bacto-Unidisks were "articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals."

In resolving this question in the negative and holding the seizure invalid, the District Court noted in a memorandum opinion[6] that the concept of drug is limited in a medical sense to articles administered to man either externally or internally, and ruled that the "evidence affords no basis for the conclusion that the definition of 'drug' in the Federal Food, Drug, and Cosmetic Act . . . was intended by Congress to extend beyond the meaning of that term in medical science, to encompass these sensitivity disks." The District Court pointed out that although a "literal reading" of § 201 (g)(1)(B) "clearly has application to the article libeled herein," enforcing such an application would be "ridiculous and contrary to common sense." The court therefore held that the Bacto-Unidisk did not fall within the purview of the Act for the reason that it was not medically a drug, and suggested, without deciding, that the discs would be more appropriately classified as "devices" under the Act.

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[5] Respondent's witnesses established that sensitivity discs are not listed in the United States Pharmacopoeia or the National Formulary, and thus do not come within that portion of the definition of "drug" in § 201 (g)(1)(A).

[6] The District Court's opinion is unreported; its pertinent findings of fact and conclusions of law are quoted in the opinion of the Court of Appeals, 392 F. 2d 21, 22–23 (1968).

On appeal, the Court of Appeals for the Sixth Circuit affirmed, accepting the District Court's conclusions that the Bacto-Unidisk was not a "drug" in the medical sense of the term and that Congress did not intend the statutory definition of "drug" to be any broader than the medical one. 392 F. 2d 21, 23. The court noted that the discs did aid physicians in the determination of what antibiotic to use for the cure, mitigation, or treatment of disease by furnishing useful information, but held that Congress did not intend to apply the statutory phrase "intended for use in the . . . cure, mitigation, [or] treatment" in such an indirect manner. 392 F. 2d 21, 22. We granted the Government's petition for certiorari because this interpretation of the Act raised issues of importance in the administration of the Federal Food, Drug, and Cosmetic Act (393 U. S. 911 (1968)).

II.

Although there was some testimony below debating the precise extent of the public health dangers posed by the sensitivity discs, the courts below declined to substitute their judgment for that of the Commissioner of Food and Drugs by determining whether his action was really necessary to protect the public health from a purely medical viewpoint. Rather, the courts below quite properly confined the inquiry to an examination of whether the disc regulations, even if medically unwise, were authorized by the Act, and more specifically, by the Act's definition of "drug." Despite the renewed effort here to relitigate the public health issue, we agree with the decision implicitly made by the courts below not to base a resolution of this case on the public need for, or medical wisdom of, the Secretary's regulations requiring pre-market clearance of antibiotic sensitivity discs. It is enough for us that the expert agency charged with the enforcement of remedial legislation has determined that such regulation is desirable for the public health, for we are hardly qualified to second-guess the Secretary's medical judgment. Our sole concern is whether the statute's definition of "drug" authorizes the disc regulations contested here; and while we agree with the lower courts' limited conception of the issue, for reasons outlined below, we reverse their disposition of it.

Respondent's primary contention here is that the sensitivity discs are not subject to any of the provisions of the Act because Congress did not intend it to cover articles used so *indirectly* in the "cure, mitigation, [and] treatment" of disease. Respondent uses the same two-step analysis relied on by the courts below: (1) Congress did not intend to write the drug definition more broadly than does the medical profession, and (2) the medical concept of drug is limited to articles that are administered to man either internally or externally. Alternatively, respondent argues, even if the Act's "intended for use" language does cover the discs, they must clearly be classified as devices. In view of the legislative history discussed below and the broad, remedial purpose of the Act itself, however, we hesitate to give the critical language such a narrow, restrictive reading in the absence of congressional direction to do so, and we therefore reject the contention that the discs do not properly fall within the purview of the Act. For the same basic reasons, we furthermore reject the argument that the discs, once found to come under the Act's coverage, must be classified specifically as devices and not drugs.

We need not stop to parse the language of the Act's definition of drug, for the District Court found, and the parties do not disagree here, that a literal reading of the words "intended for use in the . . . cure, mitigation, [or] treatment" of disease "clearly has application" to the Bacto-Unidisk. Although respondent again urges that the disc itself does not "treat" a patient in the same way an antibiotic does in terms of personal application, the disc plays at least some role in the selection of the appropriate drug. Thus, the essential question for our determination is whether Congress intended the definition of drug to have the broad coverage the courts below and the parties agree its words allow. Viewing the structure, the legislative history, and the remedial nature of the Act, we think it plain that Congress intended to define "drug" far more broadly than does the medical profession. The reason for including a separate, almost parallel, definition of "devices" in the Act is, as the legislative history shows, relevant to congressional intent. It is therefore helpful to consider both the question of the Act's initial application and the question of the drug-device dichotomy at the same time.

III.

At the outset, it is clear from § 201 that the word "drug" is a term of art for the purposes of the Act, encompassing far more than the strict medical definition of that word. If Congress had intended to limit the statutory definition to the medical one, it could have so stated explicitly, or simply have made reference to the official United States Pharmacopoeia (or the National Formulary), as it did in the first of the three subsections of § 201 (g)(1), and let the definition rest there. The historical expansion of the statute's definition, furthermore, clearly points out Congress' intention of going beyond the medical usage. The 1906 Food and Drug Act, for instance, defined "drug" in a rather limited way to include "all medicines and preparations recognized in the United States Pharmacopoeia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals." 34 Stat. 768, 769. As subsequent congressional action clearly indicates, however, the scope of that original definition has since been greatly enlarged.

The enactment of the 1938 Federal Food, Drug, and Cosmetic Act illustrates the expansion of the definition of drug. One of the changes contemplated in S. 2800, an early version of the Act,[7] defined "drug" to include

> "(1) all substances and preparations recognized in the United States Pharmacopoeia, Homoeopathic Pharmacopoeia of the United States, or National Formulary or supplements thereto; and (2) all substances, preparations, and *devices* intended for use in the cure, mitigation, treatment, or prevention of disease in man or other animals; and (3) all substances and preparations, other than food, and all devices intended to affect the structure or any function of the body." (See S. Rep. No. 493, 73d Cong., 2d Sess. (1934).) (Emphasis added.)

Senator Copeland of New York, who sponsored the Act, remarked about the inclusion of the word "devices" in his prepared statement introducing S. 2800 as follows:

> "The present law defines drugs as substances or mixtures of substances intended to be used for the cure, mitigation, or prevention of disease. This narrow definition permits escape from legal control of all therapeutic or curative devices like electric belts, for example. It also permits the escape of

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[7] The earliest versions were S. 1944, 73d Cong., 1st Sess. (1933), and S. 2000, 73d Cong., 2d Sess. (1934). S. 2800 was succeeded by S. 5, 74th Cong., 1st Sess. (1935). S. 5 died in the House, but was succeeded by S. 5, 75th Cong., 1st Sess. (1937), and was the bill eventually enacted into law, as supplemented by S. 3073, 75th Cong., 2d Sess. (1937), and H. R. 9341, 75th Cong., 3d Sess. (1938).

Most of the Act's legislative history is reprinted in C. Dunn, Federal Food, Drug, and Cosmetic Act (1938).

> preparations which are intended to alter the structure or some function of the body, as, for example, preparations intended to reduce excessive weight. There are many worthless and some dangerous devices and preparations falling within these classifications. S. 2800 contains ample authority to control them." (78 Cong. Rec. 8960 (1934).)

The definition was revised in S. 5, 74th Cong., 1st Sess. (1935), to include substances, preparations, and devices intended for *diagnostic* purposes, as well as for cure, mitigation, treatment, or prevention of disease (S. 5, § 201 (b), S. Rep. No. 361, 74th Cong., 1st Sess. (1935)).[8] As the inclusion of the word "diagnosis" came before the Senate for consideration, a controversy developed on the floor, aimed more at the word "devices," which was not then before the Senate, than at the word "diagnosis." 79 Cong. Rec. 4841–4845 (1935).[9] Senator Clark contended that it was not proper to classify devices as drugs, and that diagnostic devices were so broadly defined as to make even a bathroom scale a drug:

> "[I]f the devices ought to be outlawed, they ought to be outlawed, and I have no objection to that; but to maintain that a purely mechanical device is a drug and to be treated as a drug in law and in logic and in lexicography is a palpable absurdity, in my opinion." *Id.*, at 4841.

In answer to Senator Clark's remark that a bathroom scale would be classified as a drug, Senator Copeland made the following comment:

> "Mr. President, I desire to state the effect of this amendment. There are on the market certain electrical devices. A man takes hold of the handles of the machine, and the indicator spins around.

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[8] See Dunn, *supra*, n. 7, at 214, 237, 239.

[9] *Id.*, at 286–296.

> It stops at 'appendicitis,' or it stops at 'meningitis' . . . . Such a device is manifestly a fraud upon society. That is what the amendment is designed to deal with." *Id.,* at 4842.

Despite Senator Copeland's proffered explanation, there was continued criticism during the Senate debates (79 Cong. Rec. 4905–4920, 5215–5234)[10] of the definition on the ground that it would lead to the incongruous result of calling the following items "drugs": shoulder braces (*id.,* at 4841), radium belts (*ibid.*), electrical devices (*id.,* at 4842), bathroom weight scales (*ibid.*), and hospital air conditioning apparatus (*id.,* at 5231).[11] The opposition finally settled on "crutches" (*id.,* at 4913)[12] to signify the ultimate absurdity of the drug definition's broad coverage.

As a result of the criticism on the Senate floor, Senator Copeland proposed an amendment to add a definition of "device" to parallel that of drug, an amendment which was included[13] when the bill was returned to the Senate Committee on Commerce and later agreed to by the Senate without debate. (*Id.,* at 8351–8355.[14]) The ultimate effect of the various amendments, of course, was still to include devices under the control of the Act for the first time, the goal Senator Copeland had originally set out to achieve. As Congressman Chapman of Kentucky explained to the House after the bill had passed the Senate, "For the first time it is proposed in a bill before Congress to control therapeutic devices . . . . There are hundreds of worthless contrivances being sold to and used by gullible people. Suffice it to say that a fake contraption for the cure of consumption is just as serious a menace to health as is a worthless drug sold for the same disease." 80 Cong. Rec. 10236 (1936).[15] According to the Chief of the Food and Drug Administration, the reason for providing a separate definition of devices, instead of using Senator Copeland's original drug definition, was simply to avoid "the incongruity of classifying certain devices, such as the electric belt, therapeutic lamps, and so forth, as drugs . . . ." (Testimony given during hearings held on S. 5 by a subcommittee of the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess. (1935).[16]) Because of that incongruity as "pointed out by the Senate in the last consideration of the bill," the official explained, "[t]hey felt it proper to provide an independent definition of 'devices.'" Thus, it is clear that two parallel definitions were provided for semantic reasons only; for the purposes of the Act, the two definitions had the same effect of subjecting both drugs and devices to the adulteration and misbranding provisions. No practical significance to the distinction between the two words arose until the pre-market clearance provisions, similar to the certification regulations for antibiotics enacted in 1945, were added after a drug tragedy in the fall of 1937.[17] (S. 3073, 75th Cong., 2d Sess.) The excepting clause of § 201 (g)(1), stating clearly that a drug cannot be a device, was also added in 1938 (S. 5, 75th Cong., 3d Sess., H. R. Rep. No. 2139).

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[10] *Id.,* at 348–385, 429–476.

[11] *Id.,* at 429 (remarks of Senator Clark).

[12] *Id.,* at 369. Senator Bailey of North Carolina remarked:

"I do not think the President of the United States would tolerate for a moment a piece of legislation that described crutches as 'drugs' and advertising as 'adulteration,' carrying the English language and the law very far."

[13] The substitute committee report noted only that: "A definition of devices is provided paralleling that of drugs. This expansion of the definition of the term 'drug' and the inclusion of devices are essential if the consumer is to be protected against a multiplicity of abuses not subject to the present law." (S. Rep. No. 646, 74th Cong., 1st Sess. (1935).) See Dunn, *supra,* n. 7, at 477.

[14] *Id.,* at 495–496.

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[15] *Id.*, at 571.

[16] *Id.*, at 1235, 1247.

The historical expansion of the definition of drug, and the creation of a parallel concept of devices, clearly show, we think, that Congress fully intended that the Act's coverage be as broad as its literal language indicates—and equally clearly, broader than any strict medical definition might otherwise allow. Strong indications from legislative history that Congress intended the broad coverage the District Court thought "ridiculous" should satisfy us that the lower courts erred in refusing to apply the Act's language as written. But we are all the more convinced that we must give effect to congressional intent in view of the well-accepted principle that remedial legislation such as the Food, Drug, and Cosmetic Act is to be given a liberal construction consistent with the Act's overriding purpose to protect the public health, and specifically, § 507's purpose to ensure that antibiotic products marketed serve the public with "efficacy" and "safety." Cf. *United States* v. *Sullivan,* 332 U. S. 689, 693–695 (1948); *United States* v. *Dotterweich,* 320 U. S. 277, 283–284 (1943).

IV.

Respondent's alternative contention, that even if its product does fall within the purview of the Act, it is plainly a "device" and therefore by definition necessarily not a "drug," must also be rejected, we believe, in light of the foregoing analysis. At the outset, it must be conceded that the language of the statute is of little assistance in determining precisely what differentiates a "drug" from a "device": to the extent that both are intended for use in the treatment, mitigation and cure of disease, the former is an "article" and the latter includes "instruments," "apparatus," and "contrivances." Despite the obvious areas of overlap in definition, we are not entirely without guidance in determining the propriety of the Secretary's decision below, given the overall goals of the Act and its legislative history.

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[17] This was the "Elixir-Sulfanilamide" tragedy of September-October, 1937, where nearly 100 persons died as the result of consuming an untested drug. See Report of the Secretary of Agriculture on Deaths Due to Elixir Sulfanilamide-Massengill (submitted in response to S. Res. 194 of November 16, 1937), in Dunn, *supra,* n. 7, at 1316–1327.

More specifically, as we have previously held in an analogous situation where the statute's language seemed insufficiently precise, the "natural way" to draw the line "is in light of the statutory purpose" (*SEC* v. *Ralston Purina Co.,* 346 U. S. 119, 124–125 (1953)).[18] Since the patient will tend to derive less benefit and perhaps some harm from a particular antibiotic if, though the drug itself was properly batch-tested, it was not the proper antibiotic to use, it was entirely reasonable for the Secretary to determine that the discs, like the antibiotics they serve, are drugs and similarly subject to pre-clearance certification under § 507. An opposite conclusion might undercut the value of testing the antibiotics themselves, for such testing would be a useless exercise if the wrong drug were ultimately administered, even partially as the result of an unreliable disc.

Furthermore, the legislative history, read in light of the statute's remedial purpose, directs us to read the classification "drug" broadly, and to confine the device exception as nearly as is possible to the types of items

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[18] Cf. *Cawley* v. *United States,* 272 F. 2d 443, 445 (C. A. 2d Cir. 1959): "[U]nless they explicitly forbid it, the purpose of a statutory provision is the best test of the meaning of the words chosen."

Congress suggested in the debates,[19] such as electric belts, quack diagnostic scales, and therapeutic lamps, as well as bathroom weight scales, shoulder braces, air conditioning units, and crutches. In upholding the Secretary's determination here, without deciding the precise contours of the "device" classification, we need only point out that the exception was created primarily for the purpose of avoiding the semantic incongruity of classifying as drugs (1) certain quack contraptions and (2) basic aids used in the routine operation of a hospital—items characterized more by their purely mechanical nature than by the fact that they are composed of complex chemical compounds or biological substances. Finally, we are supported in the decision to uphold the FDA's determination that the sensitivity discs fall under the coverage of the Act and specifically under the drug provision thereof by the knowledge that the classification of these discs as drugs may not be as contrary to common medical usage as the District Court and respondent would have us believe.[20]

In upholding the Secretary's construction of the Act, we are not unmindful of our warning that "[i]n our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." *62 Cases of Jam* v. *United States,* 340

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[19] Cf. *AMP Inc.* v. *Gardner,* 389 F. 2d 825, 830 (C. A. 2d Cir.), cert. denied *sub nom., AMP Inc.* v. *Cohen,* 393 U. S. 825 (1968), petition for rehearing pending.

[20] See W. Dorland's Illustrated Medical Dictionary 449 (24th ed., 1965), where "drug" is defined as "Any chemical compound or any non-infectious biological substance, not used for its mechanical properties, which may be administered to or used on or for patients, either human or animal, as an aid in the diagnosis, treatment or prevention of disease or other abnormal condition, for the relief of pain or suffering, or to control or improve any physiological or pathological condition."

U. S. 593, 600 (1951). Our holding here simply involves an obvious corollary to that principle, that we must take care not to narrow the coverage of a statute short of the point where Congress indicated it should extend.

Reversed.

MR. JUSTICE DOUGLAS, being of the view that an antibiotic sensitivity disc used by physicians to aid them in determining what antibiotic drug, if any, to give to a patient, is a "device" as defined in § 201 (h)[*] of the Act, not a "drug" as defined in § 201 (g), would affirm the judgment.

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[*] "The term 'device' . . . means instruments, apparatus, and contrivances . . . for use in the diagnosis . . . of disease in man . . . ." It would indeed be difficult to write a clearer description of an antibiotic sensitivity disc.

McDONALD ET AL. *v.* BOARD OF ELECTION COMMISSIONERS OF CHICAGO ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 68. Argued November 19, 1968.—
Decided April 28, 1969.

Appellants are qualified Cook County electors who are unsentenced inmates of the Cook County jail awaiting trial. They allege that Illinois' failure to include them among the classes of persons entitled to absentee ballots violates the Equal Protection Clause of the Fourteenth Amendment. The District Court granted summary judgment for appellees holding that extending absentee ballots to those physically incapacitated for medical reasons constituted a proper and reasonable classification not violative of equal protection. *Held:* Illinois' failure to provide absentee ballots for appellants does not violate the Equal Protection Clause. Pp. 806–811.

(a) While classifications "which might invade or restrain [voting rights] must be closely scrutinized and carefully confined," a more exacting judicial scrutiny is not necessary here, since the distinctions made by Illinois' absentee voting provisions are not drawn on the basis of wealth or race, *Harper* v. *Virginia Board of Elections,* 383 U. S. 663, and there is nothing in the record to show that Illinois has precluded appellants from voting. Pp. 806–808.

(b) A state legislature traditionally has been allowed to take reform "one step at a time" and need not run the risk of losing its entire remedial scheme (here absentee voting) because it failed to cover every group that might have been included. Pp. 809, 811.

(c) Since there is nothing to show that the judicially incapacitated appellants are absolutely prohibited from voting, it is reasonable for Illinois to treat differently the physically handicapped. Pp. 809–810.

(d) Constitutional safeguards are not offended by the different treatment accorded unsentenced inmates incarcerated within and those incarcerated without their counties of residence. P. 810.

277 F. Supp. 14, affirmed.

Stanley A. Bass argued the cause for appellants. With him on the briefs was *Marshall Patner*.

Stanley T. Kusper, Jr., argued the cause for appellees. With him on the brief was *Matthew J. Beemsterboer*.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

Appellants and the class they represent are unsentenced inmates awaiting trial in the Cook County jail who, though they are qualified Cook County electors, cannot readily appear at the polls either because they are charged with nonbailable offenses or because they have been unable to post the bail imposed by the courts of Illinois.[1] They cannot obtain absentee ballots, for they constitute one of a number of classes for whom no provision for absentee voting has yet been made by the Illinois Legislature. The constitutionality of Illinois' failure to include them with those who are entitled to vote absentee is the primary issue in this direct appeal from a three-judge court.

The specific provisions attacked here, Ill. Rev. Stat., c. 46, §§ 19-1 to 19-3, have made absentee balloting available to four classes of persons: (1) those who are absent from the county of their residence for any reason whatever; (2) those who are "physically incapacitated," so long as they present an affidavit to that effect from a licensed physician; (3) those whose observance of a religious holiday precludes attendance at the polls; and (4) those who are serving as poll watchers in precincts other than their own on election day.[2] The availability of the absentee ballot in Illinois has been extended to its present coverage by various amendments over the last 50 years. Prior to 1917, Illinois had no provision for absentee voting, requiring personal attendance at the polls, and in that year the legislature made absentee voting available to those who would be absent from the county on business or other duties. In 1944 absentee voting was made available to all those absent from the county for any reason. The provisions for those remaining in the county but unable to appear at the polls because of physical incapacity, religious holidays, or election duties were added in 1955, 1961, and 1967, respectively.

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[1] At the time of bringing suit, appellant McDonald was being held without bail on a charge of murder; his subsequent trial resulted in a hung jury, and he then pleaded to a reduced charge of manslaughter, a bailable offense. Appellant Byrd, who was discharged after his robbery complaint was dismissed at his preliminary hearing, had been held because of his inability to post a $5,000 bond.

On March 29, 1967, appellants made timely[3] application for absentee ballots for the April 4 primary because of their physical inability to appear at the polls on that election day. The applications were accompanied by an affidavit from the warden of the Cook County jail attesting to that inability. These applications were refused by the appellee Board of Election Commissioners on the ground that appellants were not "physically incapacitated" within the meaning of §§ 19-1 and 19-2 of the Illinois Election Code. On the same day appellants filed a complaint, alleging that they were unconstitutionally excluded from the coverage of the absentee provisions. They requested that a three-judge court be convened to rule the provisions violative of equal protection insofar as the provisions required denial of an absentee ballot to one judicially incapacitated while making it available at the same time to one medically incapacitated; and they sought an injunction to restrain appellee Board "from refusing to grant [appellants'] timely applications for absentee ballots." The District Court granted appellants' request for temporary relief on March 30, before the three-judge court was convened, and ordered the Board to issue ballots to qualified Illinois electors awaiting trial in the Cook County jail.[4] Both parties then filed motions for summary judgment, the Board asserting that to honor the applications would subject its members to criminal liability under Illinois law.[5]

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[2] Section 19-1 of the Illinois Election Code identifies those persons who can apply for absentee ballots. Section 19-2 provides for the time and manner in which such application must be made, including the requirement that affidavits from a licensed attending physician or a Christian Science practitioner accompany applications from those physically incapacitated. Section 19-3 sets out the format of the applications and accompanying affidavits. In addition to their allegations that these provisions violate equal protection, appellants also sought below a ruling that appellee Board, in interpreting these laws, had misconstrued them not to include judicially incapacitated persons. Reading § 19-1 together with § 19-2, the District Court concluded that appellants were not included within the coverage of the provisions, and this statutory construction is not challenged here.

[3] Appellants do not challenge the provisions setting out the time within which the applications must be made and thus concede that those persons incarcerated just prior to election day are not entitled to an absentee ballot.

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[4] The grant of temporary relief was based in part on an earlier suit brought by appellant McDonald in the District Court for such equitable relief as would allow him to vote in the February 28, 1967, primary and aldermanic election in Chicago. In ordering the Board to furnish appellant with an absentee ballot for that election, the one-judge court noted that Illinois statutes specifically disenfranchised only those who were convicted and sentenced (Ill. Rev. Stat., c. 46, § 3-5 (1967)), that persons awaiting trial in jails in counties other than their resident counties could qualify for an absentee ballot as one "absent from the county in which he is a qualified elector," and that the Illinois Legislature did not intend to exclude individuals in appellant's circumstances from among those "physically incapacitated." *McDonald* v. *Board of Election Commissioners of Chicago*, 265 F. Supp. 816 (1967).

[5] Ill. Rev. Stat., c. 46, §§ 29A-1, 29A-5 (1967), provide for penalties of up to five years' imprisonment, or a fine not to exceed $5,000, or both, for violating the Illinois Election Code. Although

On December 11, the District Court granted summary judgment for the Board, holding that the Illinois provisions extending absentee voting privileges to those physically incapacitated because of medical reasons from appearing at the polls constituted a proper and reasonable legislative classification not violative of equal protection. The case was brought here by appellants on direct appeal, 390 U. S. 1038 (1968), and we affirm.

Appellants argue that Illinois' absentee ballot provisions violate the Equal Protection Clause of the Fourteenth Amendment for two reasons. First, they contend that since the distinction between those medically incapacitated and those "judicially" incapacitated bears no reasonable relationship to any legitimate state objective, the classifications are arbitrary and therefore in violation of equal protection. Secondly, they argue that since pretrial detainees imprisoned in other States or in counties within the State other than those of their own residence can vote absentee as Illinois citizens absent from the county for any reason, it is clearly arbitrary to deny the absentee ballot to other unsentenced inmates simply because they happen to be incarcerated within their own resident counties. Underlying appellants' contentions is the assertion that since voting rights are involved, there is a narrower scope for the operation of the presumption of constitutionality than would ordinarily be the case with state legislation challenged in this Court. See *Yick Wo* v. *Hopkins,* 118 U. S. 356, 370 (1886).

Before confronting appellants' challenge to Illinois' absentee provisions, we must determine initially how stringent a standard to use in evaluating the classifications made thereunder and whether the distinctions must be justified by a compelling state interest; for appellants as-

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there are no controlling Illinois cases, neither party contends here that the absentee ballot provisions are permissive only, allowing the grant of absentee ballots to any one not specified in the statute.

sert that we are dealing generally with an alleged infringement of a basic, fundamental right. See, *e. g., Reynolds* v. *Sims,* 377 U. S. 533 (1964); *Harper* v. *Virginia Board of Elections,* 383 U. S. 663 (1966). Thus, while the "States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised," *Lassiter* v. *Northampton County Board of Elections,* 360 U. S. 45, 50 (1959), we have held that once the States grant the franchise, they must not do so in a discriminatory manner. See *Carrington* v. *Rash,* 380 U. S. 89 (1965). More importantly, however, we have held that because of the overriding importance of voting rights, classifications "which might invade or restrain them must be closely scrutinized and carefully confined" where those rights are asserted under the Equal Protection Clause; *Harper* v. *Virginia Board of Elections, supra,* at 670. And a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, *Harper* v. *Virginia Board of Elections, supra,* two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny. *Douglas* v. *California,* 372 U. S. 353 (1963); *McLaughlin* v. *Florida,* 379 U. S. 184, 192 (1964).

Such an exacting approach is not necessary here, however, for two readily apparent reasons. First, the distinctions made by Illinois' absentee provisions are not drawn on the basis of wealth or race. Secondly, there is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote. It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots. Despite appellants' claim to the contrary, the absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of the franchise; nor, indeed, does Illinois' Election Code so operate as a whole, for the State's statutes specifically disenfranchise only those who have been convicted and sentenced, and not those similarly situated to appellants. Ill. Rev. Stat., c. 46, § 3-5 (1967). Faced as we are with a constitutional question, we cannot lightly assume, with nothing in the record to support such an assumption, that Illinois has in fact precluded appellants from voting.[6] We are then left with the more traditional standards for evaluating appellants' equal protection claims.[7] Though the wide leeway allowed the States by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently, and the presumption of statutory validity that adheres thereto, admit of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. See *McGowan* v. *Maryland,* 366 U. S. 420 (1961); *Kotch* v. *Board of River Port Pilot Commissioners,* 330 U. S. 552 (1947); *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61 (1911). With this much discretion, a legislature traditionally has been allowed to take reform "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," *Williamson* v. *Lee Optical of Oklahoma, Inc.,* 348 U. S. 483, 489 (1955); and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked. See *Ozan Lumber Co.* v. *Union County National Bank,* 207 U. S. 251 (1907).

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[6] Appellants agree that the record is barren of any indication that the State might not, for instance, possibly furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own.

[7] Appellants make two additional claims here, which were asserted below and which are unrelated to their argument based on the statute and its alleged denial of equal protection. They allege first that, wholly apart from the absentee provisions, they are constitutionally entitled to cast their ballots by mail in order to avoid an impermissible consequence of pretrial detention. They argue that of all voters they are the only class forcibly restrained by the State from attending the polls in person; and they contend that they should get an *absentee* ballot only because Illinois has set up such a system, obviating any necessity to march them to the polls under armed guard—a procedure they concede would be disruptive and expensive. Appellants claim secondly that to the extent that they cannot afford the posted bail, they are being denied their right to vote solely because of their indigency, contrary to *Harper* v. *Virginia Board of Elections,* 383 U. S. 663 (1966). Since there is nothing in the record to show that appellants are in fact absolutely prohibited from voting by the State, see n. 6, *supra,* we need not reach these two contentions.

Since there is nothing to show that a judicially incapacitated, pretrial detainee is absolutely prohibited from exercising the franchise, it seems quite reasonable for Illinois' Legislature to treat differently the physically handicapped, who must, after all, present affidavits from their physicians attesting to an absolute inability to appear personally at the polls in order to qualify for an absentee ballot. Illinois could, of course, make voting easier for all concerned by extending absentee voting privileges to those in appellants' class. Its failure to do so, however, hardly seems arbitrary, particularly in view of the many other classes of Illinois citizens not covered by the absentee provisions, for whom voting may be extremely difficult, if not practically impossible.[8]

Similarly, the different treatment accorded unsentenced inmates incarcerated within and those incarcerated without their resident counties may reflect a legislative determination that without the protection of the voting booth, local officials might be too tempted to try to influence the local vote of in-county inmates. Such a temptation with its attendant risks to prison discipline would, of course, be much less urgent with prisoners incarcerated out of state or outside their resident counties. Constitutional safeguards are not thereby offended simply because some prisoners, as a result, find voting more convenient than appellants.

We are satisfied then that appellants' challenge to the allegedly unconstitutional incompleteness of Illinois' absentee voting provisions cannot be sustained. Ironically, it is Illinois' willingness to go further than many States[9] in extending the absentee voting privileges so as to include even those attending to election duties that has provided appellants with a basis for arguing that the provisions operate in an invidiously discriminatory fashion to deny them a more convenient method of exercising the franchise. Indeed, appellants' challenge seems to disclose not an arbitrary scheme or plan but, rather, the very opposite—a consistent and laudable state policy of adding, over a 50-year period, groups to the absentee coverage as their existence comes to the attention of the legislature. That Illinois has not gone still further, as perhaps it might, should not render void its remedial legislation, which need not, as we have stated before, "strike at all evils at the same time." *Semler* v. *Dental Examiners*, 294 U. S. 608, 610 (1935).

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[8] A number of identifiable groups are not yet entitled to vote absentee under Illinois legislation: those serving on juries within the county of their residence, mothers with children who cannot afford a baby sitter, persons attending ill relations within their own county, servicemen stationed in their own counties, doctors who are often called on to do emergency work, and businessmen called away from their precincts on business. On the other hand, any person in the above groups, including an unsentenced prisoner, presumably can get an absentee ballot if he is outside his resident county, ill, or observing a religious holiday.

[9] Only three other States make provision for election duties, and 14 others for religious observance. Several States have gone further than Illinois, Wisconsin making provision for jury duty, Wis. Stat. § 6.85 (1967), and Alaska, California, and Oregon making provision for inaccessibility of polls, Alaska Stat. § 15.20.010 (1962), Cal. Elections Code § 14620 (1961), Ore. Rev. Stat. §§ 253.010 (1)(a), 253.510 (1965). Maine appears to be the only State to allow the absentee ballot

Accordingly, the judgment of the District Court is

Affirmed.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART concur in the result.

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for absence from the polls for any "sufficient" reason, Me. Rev. Stat. Ann., Tit. 21, §§ 1251, 1306 (1964).

On the other hand, all States make provisions for the Armed Forces, either expressly or impliedly. All but five States have extended the ballot to the physically disabled, and only six require absence from the State, rather than county or precinct, as a condition. See appellants' survey of state laws submitted after argument.

BURTON ET AL. v. SILLS, ATTORNEY GENERAL OF NEW JERSEY, ET AL.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 1158. Decided April 28, 1969.

53 N. J. 86, 248 A. 2d 521, appeal dismissed.

William E. Ozzard for appellants.

Arthur J. Sills, Attorney General of New Jersey, *pro se*, *Marilyn Loftus Schauer*, Acting First Assistant Attorney General, and *Stephen Skillman*, Deputy Attorney General, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE BRENNAN took no part in the consideration or decision of this case.

SULLIVAN v. ALABAMA STATE BAR ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA.

No. 1170. Decided April 28, 1969.

295 F. Supp. 1216, affirmed.

Fred Blanton, Jr., for appellant.

Truman Hobbs for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

LOMBARDY ET AL. *v.* PETER KIEWIT SONS' CO. ET AL.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 1168. Decided April 28, 1969.

266 Cal. App. 2d 599, 72 Cal. Rptr. 240, appeal dismissed and certiorari denied.

Hyman Goldman for appellants.

Henry F. Walker for Peter Kiewit Sons' Co., and *Jack M. Miller* and *Robert L. Meyer* for the State of California, appellees.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

MOORE ET AL. *v.* OGILVIE, GOVERNOR OF ILLINOIS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 620. Argued March 27, 1969.—Decided May 5, 1969.

Appellants, who were independent candidates for presidential electors from Illinois in the 1968 election, sought declaratory and injunctive relief from a denial of certification by appellees, members of the State's Electoral Board. An Illinois statute provides that nominating petitions for independent candidates must have 25,000 signatures, including 200 signatures from each of at least 50 of the State's 102 counties. Appellants' petitions contained over 25,000 signatures, but not 200 voters from each of 50 counties. Of the State's registered voters, 93.4% reside in the 49 most populous counties and only 6.6% in the remaining 53 counties. The District Court dismissed the complaint, relying on *MacDougall* v. *Green,* 335 U. S. 281. *Held:*

1. The case is not moot, as the burden which *MacDougall* v. *Green, supra,* placed on nominations for statewide offices controls future elections, and reflects a continuing federal-state controversy which needs resolution. P. 816.

2. The Illinois statute, which is an integral part of the election process, applies a rigid, arbitrary formula to sparsely settled counties and populous counties alike, and thus discriminates against the residents of the populous counties in the exercise of their political rights in violation of the Equal Protection Clause of the Fourteenth Amendment. *MacDougall* v. *Green, supra,* overruled. Pp. 816–819.

293 F. Supp. 411, reversed.

Richard F. Watt argued the cause for appellants. With him on the brief were *Richard L. Mandel* and *Ira A. Kipnis.*

John J. O'Toole and *Richard E. Friedman,* Assistant Attorneys General of Illinois, argued the cause for appellees. With them on the brief was *William J. Scott,* Attorney General.

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE BRENNAN.

This is a suit for declaratory relief and for an injunction, 28 U. S. C. §§ 2201, 2202, brought by appellants who are independent candidates for the offices of electors of President and Vice President of the United States from Illinois. The defendants or appellees are members of the Illinois Electoral Board. Ill. Rev. Stat., c. 46, §§ 7-14. In 1968 appellants filed with appellees petitions containing the names of 26,500 qualified voters who desired that appellants be nominated. The appellees ruled that appellants could not be certified to the county clerks for the November 1968 election because of a proviso added in 1935 to an Illinois statute requiring that at least 25,000 electors sign a petition to nominate such candidates. The proviso reads:

> "that included in the aggregate total of 25,000 signatures are the signatures of 200 qualified voters from each of at least 50 counties." Ill. Rev. Stat., c. 46, § 10-3 (1967).

A three-judge District Court was convened, 28 U. S. C. §§ 2281, 2284, which, feeling bound by *MacDougall* v. *Green,* 335 U. S. 281, dismissed the complaint for failure to state a cause of action. 293 F. Supp. 411. The case is here on appeal. 28 U. S. C. § 1253.

On October 8, 1968, the same day the case was docketed, appellants filed a motion to advance and expedite the hearing and disposition of this cause. Appellees opposed the motion. On October 14, 1968, we entered the following order:

> "Because of the representation of the State of Illinois that 'it would be a physical impossibility' for the State 'to effectuate the relief which the appellants seek,' the 'Motion to Advance and Expedite the

> Hearing and Disposition of this Cause' is denied. MR. JUSTICE FORTAS would grant the motion." 393 U. S. 814.

Appellees urged in a motion to dismiss that since the November 5, 1968, election has been held, there is no possibility of granting any relief to appellants and that the appeal should be dismissed. But while the 1968 election is over, the burden which *MacDougall* v. *Green*, *supra*, allowed to be placed on the nomination of candidates for statewide offices remains and controls future elections, as long as Illinois maintains her present system as she has done since 1935. The problem is therefore "capable of repetition, yet evading review," *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 515. The need for its resolution thus reflects a continuing controversy in the federal-state area where our "one man, one vote" decisions have thrust. We turn then to the merits.

MacDougall v. *Green* is indistinguishable from the present controversy. The allegations in that case were that 52% of the State's registered voters were residents of Cook County alone, 87% were residents of the 49 most populous counties, and only 13% resided in the 53 least populous counties. The argument was that a nominating procedure so weighted violates the Equal Protection Clause.

Today, in contrast, 93.4% of the State's registered voters reside in the 49 most populous counties, and only 6.6% are resident in the remaining 53 counties. The constitutional argument, however, remains the same.

Five members of the Court held in *MacDougall* that a State has "the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former." 335 U. S., at 284. Three members of the Court dissented on the ground that the nominating procedure violated the Equal Protection Clause. One member of the Court voted not to exercise this Court's jurisdiction in equity to resolve the dispute.

While the majority cited *Colegrove* v. *Green,* 328 U. S. 549, as their authority for denying relief and while a few who took part in *Colegrove* put this type of question in the "political" as distinguished from the "justiciable" category, 328 U. S., at 552, that matter was authoritatively resolved in *Baker* v. *Carr,* 369 U. S. 186, 202. When a State makes classifications of voters which favor residents of some counties over residents of other counties, a justiciable controversy is presented. 369 U. S., at 198–204.

When we struck down the Georgia county-unit system in statewide primary elections, we said:

> "How then can one person be given twice or ten times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment." *Gray* v. *Sanders,* 372 U. S. 368, 379.

Reynolds v. *Sims,* 377 U. S. 533, held that a State in an apportionment of state representatives and senators among districts and counties could not deprive voters in the more populous counties of their proportionate share of representatives and senators.

> "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." 377 U. S., at 555.

We have said enough to indicate why *MacDougall* v. *Green* is out of line with our recent apportionment cases. The use of nominating petitions by independents to obtain a place on the Illinois ballot is an integral part of her elective system. See *People* v. *Election Commissioners,* 221 Ill. 9, 18, 77 N. E. 321, 323. All procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote. *United States* v. *Classic,* 313 U. S. 299, 314–318; *Smith* v. *Allwright,* 321 U. S. 649, 664.

Dusch v. *Davis,* 387 U. S. 112, is not relevant to the problem of this case. There each councilman was required to be a resident of the borough from which he was elected. Like the residence requirement for state senators from a multi-district county (*Fortson* v. *Dorsey,* 379 U. S. 433), the place of residence did not mark the voting unit; for in *Dusch* all the electors in the city voted for each councilman.

It is no answer to the argument under the Equal Protection Clause that this law was designed to require statewide support for launching a new political party rather than support from a few localities. This law applies a rigid, arbitrary formula to sparsely settled counties and populous counties alike, contrary to the constitutional theme of equality among citizens in the exercise of their political rights. The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.

Under this Illinois law the electorate in 49 of the counties which contain 93.4% of the registered voters may not form a new political party and place its candidates on the ballot. Yet 25,000 of the remaining 6.6% of registered voters properly distributed among the 53 remaining counties may form a new party to elect candidates to office. This law thus discriminates against the residents of the populous counties of the State in favor of rural sections. It, therefore, lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment.

MacDougall v. *Green* is overruled.

Reversed.

MR. JUSTICE STEWART, with whom MR. JUSTICE HARLAN joins, dissenting.

I cannot join in the Court's casual extension of the "one voter, one vote" slogan to a case that involves neither voters, votes, nor even an ongoing dispute.

First of all, the case is moot. The appellants brought this action merely as prospective "candidates for the offices of Electors of President and Vice-President of the United States from the State of Illinois to be voted on at the general election to be held on November 5, 1968." But the 1968 election is now history, and no relief relating to its outcome is sought. In the absence of any assertion that the appellants intend to participate as candidates in any future Illinois election, the Court's reference to cases involving "continuing controversies" between the parties is wide of the mark. Cf. *Golden* v. *Zwickler, ante,* p. 103. There simply remains no judicially cognizable dispute in this case. Since, however, the Court reaches a contrary conclusion, I shall indicate briefly the reasons for my disagreement with its holding on the merits.

The legislative apportionment cases, upon which the Court places its entire reliance, were decided on the theory that *voters* residing in "underrepresented" electoral districts were denied equal protection.

> "Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there." *Reynolds* v. *Sims,* 377 U. S. 533, 563.

In this case, by contrast, the appellants have sued merely as prospective candidates for office. They claim no impairment whatever of any interests they might have as voters; indeed, their complaint contains no allegation that any of them is in fact a qualified Illinois voter. Undeterred by the appellants' failure to explain how or as against whom they themselves are denied equal protection, however, the Court reaches out to hold that this statute "discriminates against the residents of the populous counties of the State in favor of rural sections." But since no "residents of the populous counties of the State" have asserted any rights, the Court's decision represents at best an advisory vindication of interests not involved in this case.

Even if the interests of voters in Illinois' "populous counties" were actually represented here, the Court's conclusion would still be completely unjustified. *Reynolds* v. *Sims, supra,* and its offspring at least involved situations in which the "debasement" or "dilution" of voting power found by the Court was the "certain" result of population variations among electoral districts. Under the Illinois statute now before us, however, no injury whatever is suffered by voters in heavily populated areas so long as their favored candidates are able to secure places on the ballot. And there is absolutely no indication in the record that the appellants could not, if they had made the effort, have easily satisfied Illinois' 50-county, 200-signature requirement. Indeed, there is no suggestion that the counties from which the appellants drew their support were "populous" rather than "rural." The rationale of *Reynolds* v. *Sims* simply does not control this case.

Any reliance by the Court on *Williams* v. *Rhodes,* 393 U. S. 23, would also be misplaced. That case involved an Ohio requirement that new political parties secure the support of over 433,000 persons—15% of the electorate—before their candidates could appear on the ballot. Here, the 25,000 signatures required by Illinois represent only about one-half of one percent of the total number of Illinois voters—a percentage requirement permissible, one would hope, under any view of the *Rhodes* case. Nor do the appellants make any showing that securing 200 signatures in less than half of the State's counties would be a burden at all comparable to that involved in *Williams* v. *Rhodes.*

The Court held in *MacDougall* v. *Green,* 335 U. S. 281, in sustaining the very statutory requirement here at issue,[1] that Illinois had pursued an "allowable State policy [of] requir[ing] that candidates for state-wide office should have support not limited to a concentrated locality." *Id.,* at 283. That conclusion seems to me to be no less sound today than it was at the time of the *MacDougall* decision.[2] Illinois' policy is, in fact, not at all unlike that upheld by the Court only two Terms ago in *Dusch* v. *Davis,* 387 U. S. 112, in which a district-residence requirement imposed upon municipal officers despite population variations among districts was nevertheless held proper as reasonably "reflect[ing] a detente between urban and rural communities . . . ." *Id.,* at 117. Cf. *Lucas* v. *Forty-Fourth General Assembly,* 377 U. S. 713, 744 (STEWART, J., dissenting); *Reynolds* v. *Sims, supra,* at 589 (HARLAN, J., dissenting).

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[1] *MacDougall* involved Ill. Rev. Stat., c. 46, § 10–2, relating to ballot position for candidates of new political parties; Ill. Rev. Stat., c. 46, § 10–3, involved here, imposes identical signature requirements for independent candidates.

[2] While *MacDougall* involved candidates for various offices, the appellants here all sought election as presidential electors. See U. S. Const., Art. II, § 1:

"Each State shall appoint, *in such Manner as the Legislature thereof may direct,* a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . ." (Emphasis added.)

I respectfully dissent.

KRAMER v. CARIBBEAN MILLS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 156. Argued January 23, 1969.—Decided May 5, 1969.

Respondent, a Haitian corporation, contracted with a Panamanian corporation to purchase some of the latter's stock for an $85,000 down payment and $165,000 in 12 annual installments. No installment payments were made, despite demands by the Panamanian company, which thereafter assigned its interest in the contract to petitioner, a Texas attorney, for $1. By a separate agreement petitioner promised to pay the Panamanian company 95% of any net recovery "solely as a Bonus." Petitioner filed a diversity action against respondent in the District Court and obtained a jury verdict for $165,000. That court denied respondent's motion to dismiss for want of jurisdiction. The Court of Appeals reversed, finding that the assignment was "improperly or collusively made" within the meaning of 28 U. S. C. § 1359. *Held:* The assignment was "improperly or collusively made" within the meaning of § 1359, as the "manufacture of Federal jurisdiction" was the very thing Congress intended to prevent by the enactment of § 1359 and its predecessors. Pp. 825–830.

(a) The legality of the assignment under Texas law does not render it valid for purposes of federal jurisdiction, as the existence of federal jurisdiction is a matter of federal, not state, law. P. 829.

(b) Section 1359 applies to diversity jurisdiction arising from the alienage of a party as well as that based on residence in different States. Pp. 829–830.

392 F. 2d 387, affirmed.

Eugene Gressman argued the cause for petitioner. With him on the briefs was *Jack Banner*.

Dennis G. Lyons argued the cause for respondent. With him on the brief was *Morris Harrell*.

MR. JUSTICE HARLAN delivered the opinion of the Court.

The sole question presented by this case is whether the Federal District Court in which it was brought had jurisdiction over the cause, or whether that court was deprived of jurisdiction by 28 U. S. C. § 1359. That section provides:

> "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

The facts were these. Respondent Caribbean Mills, Inc. (Caribbean) is a Haitian corporation. In May 1959 it entered into a contract with an individual named Kelly and the Panama and Venezuela Finance Company (Panama), a Panamanian corporation. The agreement provided that Caribbean would purchase from Panama 125 shares of corporate stock, in return for payment of $85,000 down and an additional $165,000 in 12 annual installments.

No installment payments ever were made, despite requests for payment by Panama. In 1964, Panama assigned its entire interest in the 1959 contract to petitioner Kramer, an attorney in Wichita Falls, Texas. The stated consideration was $1. By a separate agreement dated the same day, Kramer promised to pay back to Panama 95% of any net recovery on the assigned cause of action,[1] "solely as a Bonus."

Kramer soon thereafter brought suit against Caribbean for $165,000 in the United States District Court for the Northern District of Texas, alleging diversity of citizenship between himself and Caribbean.[2] The District

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[1] That is, Kramer would receive 5%, and Panama 95%, of the net proceeds remaining after payment of attorneys' fees and expenses of litigation.

[2] Title 28 U. S. C. § 1332 (a)(2) grants district courts original jurisdiction of civil actions in which the matter in controversy exceeds $10,000 and is between "citizens of a State, and foreign states or citizens or subjects thereof . . . ." The District Court would have had no jurisdiction of a suit brought by Panama against Caribbean, since both were alien corporations.

Court denied Caribbean's motion to dismiss for want of jurisdiction. The case proceeded to trial, and a jury returned a $165,000 verdict in favor of Kramer.

On appeal, the Court of Appeals for the Fifth Circuit reversed, holding that the assignment was "improperly or collusively made" within the meaning of 28 U. S. C. § 1359, and that in consequence the District Court lacked jurisdiction. We granted certiorari, 393 U. S. 819 (1968). For reasons which follow, we affirm the judgment of the Court of Appeals.

I.

The issue before us is whether Kramer was "improperly or collusively made" a party "to invoke the jurisdiction" of the District Court, within the meaning of 28 U. S. C. § 1359. We look first to the legislative background.

Section 1359 has existed in its present form only since the 1948 revision of the Judicial Code. Prior to that time, the use of devices to create diversity was regulated by two federal statutes. The first, known as the "assignee clause," provided that, with certain exceptions not here relevant:

> "No district court shall have cognizance of any suit . . . to recover upon any promissory note or other chose in action in favor of any assignee, . . . unless such suit might have been prosecuted in such court . . . if no assignment had been made."[3]

The second pre-1948 statute, 28 U. S. C. § 80 (1940 ed.),[4] stated that a district court should dismiss an action whenever:

> "it shall appear to the satisfaction of the . . . court . . . that such suit does not really and sub-

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[3] 28 U. S. C. § 41 (1) (1940 ed.). The clause first appeared as § 11 of the Judiciary Act of 1789, 1 Stat. 79.

[4] This statute was first enacted in 1875. See 18 Stat. 470.

> stantially involve a dispute or controversy properly within the jurisdiction of [the] court, or that the parties to said suit have been improperly or collusively made or joined . . . for the purpose of creating [federal jurisdiction]."

As part of the 1948 revision, § 80 was amended to produce the present § 1359. The assignee clause was simultaneously repealed. The Reviser's Note describes the amended assignee clause as a " 'jumble of legislative jargon,' "[5] and states that "[t]he revised section changes this clause by confining its application to cases wherein the assignment is improperly or collusively made . . . . Furthermore, . . . the original purpose of [the assignee] clause is better served by substantially following section 80." That purpose was said to be "to prevent the manufacture of Federal jurisdiction by the device of assignment." *Ibid.*

II.

Only a small number of cases decided under § 1359 have involved diversity jurisdiction based on assignments,[6] and this Court has not considered the matter since the 1948 revision. Because the approach of the former assignee clause was to forbid the grounding of jurisdiction upon *any* assignment, regardless of its circumstances or purpose,[7] decisions under that clause are of little assistance. However, decisions of this Court under the other predecessor statute, 28 U. S. C. § 80 (1940 ed.), seem squarely in point. These decisions, together with the evident purpose of § 1359, lead us to conclude that the Court of Appeals was correct in finding that the assignment in question was "improperly or collusively made."

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[5] The quotation is from a Comment, Chaos of Jurisdiction in the Federal District Courts, 35 Ill. L. Rev. 566, 569 (1941); it refers primarily to the obscure wording of certain exceptions contained in the clause. See *id.*, at 569–571.

[6] See cases cited in 3A J. Moore, Federal Practice ¶17.05[3.–1], nn. 7–9 (2d ed. 1968).

[7] There were exceptions for particular types of assignments, none of which is relevant here.

The most compelling precedent is *Farmington* v. *Pillsbury,* 114 U. S. 138 (1885). There Maine holders of bonds issued by a Maine village desired to test the bonds' validity in the federal courts. In an effort to accomplish this, they cut the coupons from their bonds and transferred them to a citizen of Massachusetts, who gave in return a non-negotiable two-year note for $500 and a promise to pay back 50% of the net amount recovered above $500. The jurisdictional question was certified to this Court, which held that there was no federal jurisdiction because the plaintiff had been "improperly or collusively" made a party within the meaning of the predecessor statute to 28 U. S. C. § 80 (1940 ed.). The Court pointed out that the plaintiff could easily have been released from his non-negotiable note, and found that apart from the hoped-for creation of federal jurisdiction the only real consequence of the transfer was to enable the Massachusetts plaintiff to "retain one-half of what he collects for the use of his name and his trouble in collecting." 114 U. S., at 146. The Court concluded that "the transfer of the coupons was 'a mere contrivance, a pretence, the result of a collusive arrangement to create' " federal jurisdiction. *Ibid.*

We find the case before us indistinguishable from *Farmington* and other decisions of like tenor.[8] When the assignment to Kramer is considered together with his total lack of previous connection with the matter and his simultaneous reassignment of a 95% interest back to Panama, there can be little doubt that the assignment was for purposes of collection, with Kramer to retain 5% of the net proceeds "for the use of his name and his trouble in collecting."[9] If the suit had been unsuccessful, Kramer would have been out only $1, plus costs. Moreover, Kramer candidly admits that the "assignment was in substantial part motivated by a desire by [Panama's] counsel to make diversity jurisdiction available . . . ."[10]

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[8] See, *e. g., Williams* v. *Nottawa,* 104 U. S. 209 (1881); *Little* v. *Giles,* 118 U. S. 596 (1886).

The conclusion that this assignment was "improperly or collusively made" within the meaning of § 1359 is supported not only by precedent but also by consideration of the statute's purpose. If federal jurisdiction could be created by assignments of this kind, which are easy to arrange and involve few disadvantages for the assignor, then a vast quantity of ordinary contract and tort litigation could be channeled into the federal courts at the will of one of the parties. Such "manufacture of Federal jurisdiction" was the very thing which Congress intended to prevent when it enacted § 1359 and its predecessors.

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[9] Hence, we have no occasion to re-examine the cases in which this Court has held that where the transfer of a claim is absolute, with the transferor retaining no interest in the subject matter, then the transfer is not "improperly or collusively made," regardless of the transferor's motive. See, *e. g., Cross* v. *Allen,* 141 U. S. 528 (1891); *South Dakota* v. *North Carolina,* 192 U. S. 286 (1904); *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.,* 276 U. S. 518 (1928); cf. *Williamson* v. *Osenton,* 232 U. S. 619 (1914).

Nor is it necessary to consider whether, in cases in which suit is required to be brought by an administrator or guardian, a motive to create diversity jurisdiction renders the appointment of an out-of-state representative "improper" or "collusive." See, *e. g., McSparran* v. *Weist,* 402 F. 2d 867 (1968); *Lang* v. *Elm City Constr. Co.,* 324 F. 2d 235 (1963); *County of Todd* v. *Loegering,* 297 F. 2d 470 (1961); cf. *Mecom* v. *Fitzsimmons Drilling Co.,* 284 U. S. 183 (1931). Cases involving representatives vary in several respects from those in which jurisdiction is based on assignments: (1) in the former situation, some representative must be appointed before suit can be brought, while in the latter the assignor normally is himself capable of suing in state court; (2) under state law, different kinds of guardians and administrators may possess discrete sorts of powers; and (3) all such representatives owe their appointment to the decree of a state court, rather than solely to an action of the parties. It is not necessary to decide whether these distinctions amount to a difference for purposes of § 1359.

[10] Brief for Petitioner 16.

III.

Kramer nevertheless argues that the assignment to him was not "improperly or collusively made" within the meaning of § 1359, for two main reasons. First, he suggests that the undisputed legality of the assignment under Texas law necessarily rendered it valid for purposes of federal jurisdiction. We cannot accept this contention. The existence of federal jurisdiction is a matter of federal, not state, law. See, *e. g., Missouri P. R. Co.* v. *Fitzgerald,* 160 U. S. 556, 582 (1896). Under the predecessor section, 28 U. S. C. § 80 (1940 ed.), this Court several times held that an assignment could be "improperly or collusively made" even though binding under state law,[11] and nothing in the language or legislative history of § 1359 suggests that a different result should be reached under that statute. Moreover, to accept this argument would render § 1359 largely incapable of accomplishing its purpose; this very case demonstrates the ease with which a party may "manufacture" federal jurisdiction by an assignment which meets the requirements of state law.

Second, Kramer urges that this case is significantly distinguishable from earlier decisions because it involves diversity jurisdiction under 28 U. S. C. § 1332 (a)(2), arising from the alienage of one of the parties, rather than the more common diversity jurisdiction based upon the parties' residence in different States. We can perceive no substance in this argument: by its terms, § 1359 applies equally to both types of diversity jurisdiction, and there is no indication that Congress intended them to be treated differently.

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[11] See, *e. g., Little* v. *Giles,* 118 U. S. 596, 602 (1886); *Lehigh Mining & Mfg. Co.* v. *Kelly,* 160 U. S. 327, 336 (1895); cf. *Smith* v. *Kernochen,* 7 How. 198, 215–216 (1849).

IV.

In short, we find that this assignment falls not only within the scope of § 1359 but within its very core. It follows that the District Court lacked jurisdiction to hear this action, and that petitioner must seek his remedy in the state courts.[12] The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

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[12] Petitioner asks that we make our ruling prospective only, asserting that he reasonably believed he had a right to invoke federal jurisdiction, and that the four-year Texas statute of limitations governing contract actions, Tex. Rev. Civ. Stat., Art. 5527 (1948), may bar him from recovering in the state courts as to some of the installments allegedly due him. However, another Texas statute, Tex. Rev. Civ. Stat., Art. 5539a (1948), provides:

> "When . . . a judgment . . . shall be set aside or annulled in a direct proceeding, because of a want of jurisdiction of the Trial Court . . . and within sixty (60) days after such dismissal . . . becomes final, such action shall be commenced in a Court of Proper Jurisdiction, the period between the date of first filing and that of commencement in the second Court shall not be counted as a part of the period of limitation unless the opposite party shall . . . show the first filing to have been in intentional disregard of jurisdiction."

This statute has been held to apply when the dismissal on jurisdictional grounds was by a federal court. See, *e. g., Burford* v. *Sun Oil Co.,* 186 S. W. 2d 306 (Ct. Civ. App. Tex. 1944). Petitioner alleges that the first contract installment accrued on July 1, 1962. Hence, Art. 5539a appears to assure him a full state-court remedy, and thus obviates the need for further discussion of prospectivity.

HALLIDAY *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 642, Misc. Decided May 5, 1969.

This Court's decision in *McCarthy* v. *United States, ante*, p. 459, holding that a defendant whose guilty plea is accepted in violation of Fed. Rule Crim. Proc. 11 must be afforded an opportunity to plead anew, is to be applied prospectively from the date of that decision.

Certiorari granted; 394 F. 2d 149, affirmed.

Laurence M. Johnson for petitioner.

Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit, and *Mervyn Hamburg* for the United States.

PER CURIAM.

The motion to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is also granted, limited to one issue: Should petitioner's conviction be reversed because the United States District Judge who accepted his guilty plea failed to comply with Rule 11 of the Federal Rules of Criminal Procedure? In our recent decision of *McCarthy* v. *United States, ante*, p. 459, we held that when a guilty plea is accepted in violation of Rule 11 the defendant must be afforded an opportunity to plead anew. Petitioner's plea was entered in 1954. The question we must decide, therefore, is whether *McCarthy* should be applied to guilty pleas accepted prior to the date of that decision. We hold that it should not.

After an evidentiary hearing on October 17, 1967, petitioner's motion to set aside his sentence under 28 U. S. C. § 2255 was denied by the United States District Court for the District of Massachusetts. The United

States Court of Appeals for the First Circuit affirmed *per curiam*. Although it acknowledged that the District Court had not complied with Rule 11 when it accepted petitioner's plea, it held that he was not entitled to relief because "ample evidence" supported the District Court's finding that the Government had met its burden of demonstrating that petitioner entered his plea voluntarily with an understanding of the nature of the charges against him.

In deciding whether to apply newly adopted constitutional rulings retroactively, we have considered three criteria: (1) the purpose of the new rule; (2) the extent of reliance upon the old rule; and (3) the effect retroactive application would have upon the administration of justice. *E. g., Desist* v. *United States, ante,* p. 244; *Stovall* v. *Denno,* 388 U. S. 293 (1967); *Johnson* v. *New Jersey,* 384 U. S. 719 (1966). In *McCarthy* we took care to note that our holding was based solely upon the application of Rule 11 and not upon constitutional grounds. Nevertheless, it is appropriate to analyze the question of that decision's retroactivity in terms of the same criteria we have employed to determine whether constitutionally grounded decisions that depart from precedent should be applied retroactively. See *Linkletter* v. *Walker,* 381 U. S. 618, 622–629 (1965).

The rule we adopted in *McCarthy* has two purposes: (1) to insure that every defendant who pleads guilty is afforded Rule 11's procedural safeguards, which are designed to facilitate the determination of the voluntariness of his plea; (2) to provide a complete record at the time the plea is entered of the factors relevant to this determination, thereby facilitating a more expeditious disposition of a post-conviction attack on the plea. Unquestionably, strict compliance with Rule 11 enhances the reliability of the voluntariness determination, and we have retroactively applied constitutionally grounded rules of criminal procedure designed to correct "serious flaws in the fact-finding process at trial." *Stovall* v. *Denno, supra,* at 298. However, a defendant whose plea has been accepted without full compliance with Rule 11 may still resort to appropriate post-conviction remedies to attack his plea's voluntariness. Thus, if his plea was accepted prior to our decision in *McCarthy,* he is not without a remedy to correct constitutional defects in his conviction. Cf. *Johnson* v. *New Jersey, supra,* at 730. And as we pointed out in *Stovall,* the extent to which a "condemned practice infects the integrity of the truth-determining process . . . must . . . be weighed against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice." *Stovall* v. *Denno, supra,* at 298. In *McCarthy* we noted that the practice we were requiring had been previously followed by only one Circuit; that over 85% of all convictions in the federal courts are obtained pursuant to guilty pleas; and that prior to Rule 11's recent amendment, not all district judges personally questioned defendants before accepting their guilty pleas. Thus, in view of the general application of Rule 11 in a manner inconsistent with our holding in *McCarthy,* and in view of the large number of constitutionally valid convictions that may have been obtained without full compliance with Rule 11, we decline to apply *McCarthy* retroactively. We hold that only those defendants whose guilty pleas were accepted after April 2, 1969, are entitled to plead anew if their pleas were accepted without full compliance with Rule 11.

Accordingly, the judgment of the Court of Appeals for the First Circuit is

Affirmed.

MR. JUSTICE HARLAN, concurring in the result.

McCarthy v. *United States, ante,* p. 459, announced no new constitutional or general procedural doctrine. That decision, on a matter of first impression in this

Court, merely interpreted Rule 11 of the Federal Rules of Criminal Procedure, as amended effective July 1, 1966, and held that the rule must be strictly applied according to its terms. I see no reason why other federal prisoners whose pleas were accepted in plain violation of the requirements of the amended rule should be deprived of the relief accorded McCarthy. See generally my dissent in *Desist* v. *United States, ante,* p. 256. I would therefore apply the *per se* rule enunciated in *McCarthy* to all pleas entered on or after July 1, 1966.

While the amended Rule 11 requires the trial judge to follow specific procedures before accepting a plea of guilty, and was promulgated for that very purpose, see Notes of Advisory Committee on Rules, the pre-1966 Rule 11 was "substantially a restatement of existing law and practice," *ibid.,* and required only that the judge "determine" that the plea was made "voluntarily with understanding of the nature of the charge," without, however, specifying a procedure for making this determination. Thus, in a pre-1966 proceeding, the trial judge may have relied on the circumstances surrounding a plea of guilty, without making a specific inquiry or findings, to conclude that the plea was voluntarily and understandingly given.

I agree with the court below that the absence of an explicit inquiry may sometimes entitle the defendant to a subsequent hearing, pursuant to 28 U. S. C. § 2255, to determine whether the plea was in fact made voluntarily and understandingly. In view of the wholly inexplicit directives of the old rule, however, I believe that such a hearing suffices, and that a plea made under that rule should not automatically be set aside as in the case of a plea made under the 1966 rule—the situation in *McCarthy.*

Petitioner's plea was accepted in 1954, without an explicit inquiry at that time whether it was voluntarily and understandingly made. Petitioner moved to vacate the plea, and after a full hearing the District Court, 274 F. Supp. 737, 738–739 (1967), affirmed by the Court of Appeals, 394 F. 2d 149 (1968), determined that "the Government has sustained its burden of showing that at the time petitioner Halliday changed his plea he in fact did understand the nature of the three charges against him and that he changed his plea voluntarily, with full awareness of the consequences of the change of plea."

On the basis of these findings, and not on any theory as to the nonretroactivity of *McCarthy,* I would affirm.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

I do not understand why there should be any discussion of the retroactivity of *McCarthy* v. *United States, ante,* p. 459, a decision of this Court this Term interpreting a Federal Rule of Criminal Procedure. If the rule's relevant portions were in full force and effect when petitioner's guilty plea was entered in 1954, then it should of course be enforced in this case; if not, the *McCarthy* decision simply has no application here at all. For this reason and for all others set out in my dissenting opinion in *Linkletter* v. *Walker,* 381 U. S. 618, 640 (1965), I would reverse the judgment below and order that petitioner's guilty plea be vacated so that he may have an opportunity to plead again.

UNITED STATES *v.* LOUISIANA ET AL. (TEXAS BOUNDARY CASE).

No. 9, Orig. Decided May 31, 1960, December 4, 1967, and March 3, 1969.—Decree Entered December 12, 1960.—Supplemental Decree Entered May 5, 1969.

Opinions reported: 363 U. S. 1; 389 U. S. 155; and *ante*, p. 1. Decree reported: 364 U. S. 502.

For the purpose of giving effect to the conclusions of this Court as stated in its opinions announced December 4, 1967, and March 3, 1969, supplementing the decree entered herein on December 12, 1960, it is ordered, adjudged and decreed as follows:

1. As against the State of Texas, the United States is entitled to—

(a) All the lands, minerals and other natural resources underlying the Gulf of Mexico that are more than three marine leagues gulfward from the present or future coastline as referred to in § 2 (c) of the Submerged Lands Act, 67 Stat. 29, 43 U. S. C. § 1301 (c); and

(b) All the lands, minerals and other natural resources underlying the Gulf of Mexico, more than three geographical miles gulfward from the present or future coastline as referred to in § 2 (c) of the Submerged Lands Act, 43 U. S. C. § 1301 (c), that are gulfward of the following line:

Beginning at a point on the international boundary with Mexico (wherever that boundary may be located), three marine leagues gulfward from the point x=2,447,033, y=105,994 (Texas Plane Coordinate System, South Zone), latitude 25°57′05.90″ N., longitude 97°08′22.85″ W., and proceeding thence northwardly and eastwardly as follows:

Course	South Zone		Latitude	Longitude
	x	*y*		
1. By arc centered at	2,447,033	105,994	25°57′05.90″	97°08′22.85″
to	2,498,223	125,226	26°00′10.59″	96°58′59.59″
2. By straight line to	2,498,068	126,760	26°00′25.80″	96°59′01.09″

Course	South Zone		Latitude	Longitude
	x	y		
3. By arc centered at............	2, 448, 661	121, 256	25°59'37.4"	97°08'58.0"
to..............................	2, 497, 383	131, 474	26°01'12.56"	96°59'07.96"
4. By straight line to............	2, 497, 076	135, 704	26°01'54.49"	96°59'10.78"
5. By straight line to............	2, 497, 119	137, 947	26°02'16.70"	96°59'10.02"
6. By straight line to............	2, 497, 240	139, 652	26°02'33.58"	96°59'08.47"
7. By arc centered at............	2, 442, 603	143, 530	26°03'18.1"	97°09'06.0"
to..............................	2, 496, 942	150, 421	26°04'20.26"	96°59'10.32"
8. By straight line to............	2, 496, 723	152, 145	26°04'37.36"	96°59'12.50"
9. By arc centered at............	2, 442, 474	145, 254	26°03'35.2"	97°09'08.2"
to..............................	2, 496, 370	154, 510	26°05'00.83"	96°59'16.06"
10. By straight line to............	2, 495, 553	159, 267	26°05'48.04"	96°59'24.39"
11. By arc centered at............	2, 441, 657	150, 011	26°04'22.4"	97°09'16.6"
to..............................	2, 495, 161	161, 316	26°06'08.37"	96°59'28.42"
12. By straight line to............	2, 494, 875	162, 668	26°06'21.79"	96°59'31.38"
13. By straight line to............	2, 494, 746	163, 636	26°06'31.39"	96°59'32.67"
14. By straight line to............	2, 492, 451	182, 957	26°09'43.01"	96°59'55.32"
15. By arc centered at............	2, 438, 148	176, 509	26°08'45.2"	97°09'52.0"
to..............................	2, 492, 330	183, 907	26°09'52.44"	96°59'56.52"
16. By straight line to............	2, 490, 612	196, 490	26°11'57.26"	97°00'13.74"
17. By arc centered at............	2, 436, 430	189, 092	26°10'50.0"	97°10'09.4"
to..............................	2, 490, 574	196, 764	26°11'59.99"	97°00'14.12"
18. By straight line to............	2, 488, 714	209, 890	26°14'10.20"	97°00'32.84"
19. By arc centered at............	2, 434, 570	202, 218	26°13'00.2"	97°10'28.3"
to..............................	2, 488, 423	211, 722	26°14'28.37"	97°00'35.80"
20. By straight line to............	2, 486, 399	223, 191	26°16'22.20"	97°00'56.54"
21. By arc centered at............	2, 432, 546	213, 687	26°14'54.0"	97°10'49.2"
to..............................	2, 486, 322	223, 615	26°16'26.40"	97°00'57.33"
22. By straight line to............	2, 484, 084	235, 738	26°18'26.73"	97°01'20.36"
23. By arc centered at............	2, 430, 308	225, 810	26°16'54.3"	97°11'12.4"
to..............................	2, 483, 535	238, 353	26°18'52.69"	97°01'26.05"
24. By straight line to............	2, 478, 947	257, 823	26°22'06.05"	97°02'13.99"
25. By arc centered at............	2, 425, 720	245, 280	26°20'07.6"	97°12'00.6"
to..............................	2, 478, 775	258, 531	26°22'13.09"	97°02'15.79"
26. By straight line to............	2, 475, 739	270, 687	26°24'13.83"	97°02'47.63"
27. By arc centered at............	2, 422, 664	257, 436	26°22'08.3"	97°12'32.6"
to..............................	2, 475, 706	270, 811	26°24'15.06"	97°02'47.96"
28. By straight line to............	2, 472, 116	285, 051	26°26'36.50"	97°03'25.67"
29. By arc centered at............	2, 419, 092	271, 676	26°24'29.7"	97°13'10.5"
to..............................	2, 471, 287	287, 990	26°27'05.71"	97°03'34.42"
30. By straight line to............	2, 466, 585	303, 033	26°29'35.22"	97°04'24.28"
31. By straight line to............	2, 461, 419	319, 706	26°32'20.92"	97°05'19.08"
32. By arc centered at............	2, 409, 184	303, 522	26°29'46.1"	97°14'56.0"
to..............................	2, 461, 209	320, 369	26°32'27.52"	97°05'21.31"
33. By straight line to............	2, 450, 926	352, 124	26°37'43.15"	97°07'10.71"
34. By arc centered at............	2, 398, 901	335, 277	26°35'01.6"	97°16'45.8"
to..............................	2, 449, 710	355, 498	26°38'16.70"	97°07'23.71"
35. By straight line to............	2, 447, 122	362, 000	26°39'21.38"	97°07'51.45"
36. By straight line to............	2, 445, 524	366, 527	26°40'06.38"	97°08'08.52"
37. By straight line to............	2, 442, 108	376, 994	26°41'50.42"	97°08'44.95"
38. By straight line to............	2, 437, 787	392, 060	26°44'20.08"	97°09'30.83"
39. By straight line to............	2, 437, 070	394, 740	26°44'46.70"	97°09'38.32"
40. By arc centered at............	2, 384, 205	380, 784	26°42'33.7"	97°19'23.0"
to..............................	2, 435, 953	398, 463	26°45'23.70"	97°09'50.30"

Course	South Zone		Latitude	Longitude
	x	*y*		
41. By straight line to	2, 435, 511	399, 759	26°45′36.57″	97°09′55.03″
42. By straight line to	2, 432, 474	410, 567	26°47′23.94″	97°10′27.28″
43. By straight line to	2, 427, 617	431, 540	26°50′52.15″	97°11′18. 47″
44. By straight line to	2, 424, 278	447, 618	26°53′31.73″	97°11′53.51″
45. By straight line to	2, 422, 538	459, 109	26°55′25.72″	97°12′11.42″
46. By arc centered at	2, 368, 469	450, 923	26°54′09.8″	97°22′09.6″
to	2, 422, 177	461, 213	26°55′46.59″	97°12′15.17″
47. By straight line to	2, 421, 519	468, 580	26°56′11.43″	97°12′22.16″
48. By arc centered at	2, 367, 051	463, 714	26°56′16.6″	97°22′24.0″
to	2, 421, 383	469, 914	26°57′12.85″	97°12′22.95″
49. By straight line to	2, 420, 872	474, 392	26°57′57.25″	97°12′28.09″
50. By arc centered at	2, 366, 540	468, 192	26°57′01.0″	97°22′29.2″
to	2, 420, 613	476, 347	26°58′16.64″	97°12′30.73″
51. By straight line to	2, 419, 889	487, 832	27°00′10.46″	97°12′37.44″
52. By straight line to	2, 419, 593	493, 822	27°01′09.82″	97°12′40.04″
53. By straight line to	2, 419, 571	498, 661	27°01′57.74″	97°12′39.73″
54. By arc centered at	2, 364, 887	498, 418	27°02′00.5″	97°22′44.5″
to	2, 419, 564	499, 351	27°02′04.57″	97°12′39.74″
55. By straight line to	2, 419, 442	506, 501	27°03′15.40″	97°12′40.28″
56. By straight line to	2, 419, 750	514, 047	27°04′30.10″	97°12′36.02″
57. By straight line to	2, 419, 951	517, 831	27°05′07.56″	97°12′33.36″
58. By straight line to	2, 420, 165	521, 009	27°05′39.01″	97°12′30.64″
59. By arc centered at	2, 365, 603	524, 676	27°06′20.5″	97°22′34.0″
to	2, 420, 260	522, 916	27°05′57.88″	97°12′29.38″
60. By straight line to	2, 420, 367	526, 247	27°06′30.86″	97°12′27.81″
61. By straight line to	2, 421, 336	538, 406	27°08′31.18″	97°12′15.70″
62. By arc centered at	2, 366, 824	542, 751	27°09′19.4″	97°22′18.7″
to	2, 421, 429	539, 789	27°08′44.87″	97°12′14.52″
63. By straight line to	2, 421, 449	540, 167	27°08′48. 61″	97°12′14.25″
64. By straight line to	2, 421, 591	540, 986	27°08°56.71″	97°12′12.59″
65. By arc centered at	2, 367, 705	550, 301	27°10′34.1″	97°22′08.2″
to	2, 422, 109	544, 769	27°09′34.13″	97°12′06.42″
66. By straight line to	2, 422, 522	548, 828	27°10′14.28″	97°12′01.39″
67. By straight line to	2, 422, 909	550, 953	27°10′35.28″	97°11′56.86″
68. By arc centered at	2, 369, 110	560, 755	27°12′17.5″	97°21′51.6″
to	2, 423, 074	551, 906	27°10′44.71″	97°11′54.92″
69. By straight line to	2, 423, 600	555, 114	27°11′16.42″	97°11′48.73″
70. By straight line to	2, 425, 604	565, 501	27°12′59.09″	97°11′25.35″
71. By straight line to	2, 425, 955	567, 201	27°13′15.88″	97°11′21.27″
72. By straight line to	2, 430, 188	585, 397	27°16′15.65″	97°10′32.26″
73. By straight line to	2, 435, 271	602, 898	27°19′08.44″	97°09′33.87″
74. By straight line to	2, 437, 860	611, 265	27°20′31.02″	97°09′04.17″
75. By straight line to	2, 440, 773	619, 882	27°21′56.05″	97°08′30.54″
76. By straight line to	2, 443, 622	627, 687	27°23′13.04″	97°07′58.31″
77. By straight line to	2, 449, 412	641, 292	27°25′27.14″	97°06′52.41″
78. By straight line to	2, 455, 945	656, 139	27°27′53.45″	97°05′38.08″
79. By straight line to	2, 459, 158	662, 847	27°28′59.52″	97°05′01.59″
80. By straight line to	2, 400, 858	666, 346	27°29′33.99″	97°04′42.27″
81. By arc centered at	2, 419, 058	701, 605	27°35′27.6″	97°12′22.4″
to	2, 468, 926	679, 163	27°31′40.01″	97°03′11.05″
82. By straight line to	2, 473, 113	688, 467	27°33′11.66″	97°02′23.35″
83. By arc centered at	2, 423, 245	710, 909	27°36′59.3″	97°11′34.8″
to	2, 477, 118	701, 518	27°35′20.43″	97°01′37.17″

Course	South Zone		Latitude	Longitude
	x	y		
84. By straight line to	2, 477, 226	701, 748	27°35′22.70″	97°01′35.93″
85. By straight line to	2, 484, 830	715, 453	27°37′37.53″	97°00′09.62″
86. By straight line to	2, 492, 830	728, 654	27°39′47.30″	96°58′38.91″
87. By straight line to	2, 503, 178	744, 730	27°42′25.23″	96°56′41.63″
88. By straight line to	2, 511, 491	757, 057	27°44′26.26″	96°55′07.44″
89. By straight line to	2, 515, 272	762, 240	27°45′17.11″	96°54′24.63″
90. By arc centered at	2, 471, 092	794, 467	27°50′41.5″	97°02′32.2″
to	2, 522, 680	776, 327	27°47′35.66″	96°53′00.17″
91. By straight line to	2, 523, 498	778, 651	27°47′58.57″	96°52′50.74″
92. By straight line to	2, 523, 986	779, 631	27°48′08.21″	96°52′45.16″
93. By straight line to	2, 526, 031	782, 992	27°48′41.29″	96°52′22.00″
94. By straight line to	2, 535, 804	796, 133	------------	------------

Course	South Central Zone		Latitude	Longitude
	x	y		
(Repeating two courses)				
93. By straight line to	2, 687, 786	−1, 095	------------	------------
94. By straight line to	2, 697, 492	11, 498	27°50′50.13″	96°50′31.25″
95. By straight line to	2, 705, 230	21, 472	27°52′27.43″	96°49′03.01″
96. By straight line to	2, 710, 958	28, 002	27°53′31.00″	96°47′57.84″
97. By arc centered at	2, 669, 848	64, 063	27°59′35.4″	96°55′28.7″
to	2, 712, 719	30, 115	27°53′51.59″	96°47′37.77″
98. By straight line to	2, 714, 852	32, 807	27°54′17.84″	96°47′13.45″
99. By straight line to	2, 720, 377	38, 910	27°55′17.21″	96°46′10.59″
100. By straight line to	2, 724, 705	43, 579	27°56′02.60″	96°45′21.36″
101. By straight line to	2, 727, 377	46, 418	27°56′30.20″	96°44′50.97″
102. By arc centered at	2, 691, 713	87, 873	28°03′27.2″	96°51′20.0″
to	2, 733, 517	52, 619	27°57′30.40″	96°43′41.20″
103. By straight line to	2, 745, 287	64, 045	27°59′21.23″	96°41′27.48″
104. By straight line to	2, 759, 114	76, 842	28°01′25.17″	96°38′50.43″
105. By straight line to	2, 760, 917	78, 432	28°01′40.55″	96°38′29.96″
106. By straight line to	2, 775, 278	90, 137	28°03′33.53″	96°35′47.09″
107. By straight line to	2, 780, 827	94, 573	28°04′16.30″	96°34′44.15″
108. By arc centered at	2, 746, 685	137, 290	28°11′26.0″	96°40′55.7″
to	2, 782, 550	96, 009	28°04′30.16″	96°34′24.59″
109. By straight line to	2, 783, 852	97, 140	28°04′41.08″	96°34′09.80″
110. By straight line to	2, 791, 476	102, 789	28°05′35.43″	96°32′43.40″
111. By straight line to	2, 800, 074	109, 137	28°06′36.47″	96°31′05.92″
112. By straight line to	2, 807, 482	114, 230	28°07′25.32″	96°29′42.01″
113. By straight line to	2, 814, 202	118, 283	28°08′04.00″	96°28′26.00″
114. By arc centered at	2, 785, 963	165, 112	28°15′53.5″	96°33′30.4″
to	2, 815, 384	119, 016	28°08′11.01″	96°28′12.63″
115. By straight line to	2, 824, 561	124, 874	28°09′07.01″	96°26′28.73″
116. By straight line to	2, 831, 319	128, 676	28°09′43.18″	96°25′12.32″
117. By straight line to	2, 836, 670	131, 276	28°10′07.75″	96°24′11.92″
118. By straight line to	2, 839, 197	132, 254	28°10′16.87″	96°23′43.45″
119. By arc centered at	2, 819, 460	183, 253	28°18′46.0″	96°27′11.5″
to	2, 840, 053	132, 594	28°10′20.04″	96°23′33.80″
120. By straight line to	2, 844, 564	134, 428	28°10′37.20″	96°22′42.95″
121. By straight line to	2, 846, 278	135, 087	28°10′43.34″	96°22′23.64″

Course	South Central Zone		Latitude	Longitude
	x	y		
122. By arc centered at	2,833,368	188,226	28°19′32.2″	96°24′34.7″
to	2,864,032	142,947	28°11′57.16″	96°19′03.31″
123. By straight line to	2,865,389	143,866	28°12′05.95″	96°18′47.92″
124. By arc centered at	2,834,725	189,145	28°19′41.0″	96°24′19.3″
to	2,879,517	157,775	28°14′20.38″	96°16′06.44″
125. By straight line to	2,880,106	158,616	28°14′28.57″	96°15′59.64″
126. By arc centered at	2,835,314	189,986	28°19′49.2″	96°24′12.5″
to	2,883,104	163,406	28°15′15.29″	96°15′24.87″
127. By straight line to	2,885,158	167,099	28°15′51.36″	96°15′00.94″
128. By arc centered at	2,837,368	193,679	28°20′25.3″	96°23′48.6″
to	2,886,819	170,332	28°16′22.99″	96°14′41.53″
129. By straight line to	2,890,783	177,022	28°17′28.27″	96°13′55.43″
130. By arc centered at	2,843,740	204,903	28°22′15.0″	96°22′34.5″
to	2,893,218	181,614	28°18′13.16″	96°13′26.99″
131. By straight line to	2,899,305	186,971	28°19′04.75″	96°12′17.48″
131a. By straight line to	2,899,402	187,052	28°19′05.53″	96°12′16.38″
132. By straight line to	2,908,291	193,515	28°20′07.38″	96°10′35.21″
133. By straight line to	2,912,716	196,355	28°20′34.44″	96°09′44.93″
134. By straight line to	2,927,833	205,781	28°22′04.06″	96°06′53.21″
135. By straight line to	2,936,888	211,198	28°22′55.48″	96°05′10.38″
136. By straight line to	2,950,886	219,194	28°24′11.14″	96°02′31.45″
137. By straight line to	2,961,311	224,721	28°25′03.23″	96°00′33.18″
138. By straight line to	2,978,776	233,372	28°26′24.39″	95°57′15.13″
139. By straight line to	2,987,582	237,367	28°27′01.65″	95°55′35.35″
140. By arc centered at	2,964,991	287,167	28°35′20.4″	95°59′34.0″
to	2,988,795	237,935	28°27′06.96″	95°55′21.60″
141. By straight line to	2,998,740	242,743	28°27′51.95″	95°53′28.80″
142. By straight line to	3,002,406	244,493	28°28′08.31″	95°52′47.22″
143. By straight line to	3,005,833	246,002	28°28′22.33″	95°52′08.38″
144. By arc centered at	2,983,797	296,051	28°36′43.5″	95°56′00.5″
to	3,007,526	246,783	28°28′29.61″	95°51′49.18″
145. By straight line to	3,026,416	255,881	28°29′54.60″	95°48′14.81″
146. By arc centered at	3,002,687	305,149	28°38′08.6″	95°52′25.9″
to	3,028,326	256,847	28°30′03.64″	95°47′53.12″
147. By straight line to	3,047,657	267,108	28°31′39.91″	95°44′13.33″
148. By arc centered at	3,022,018	315,410	28°39′45.0″	95°48′45.9″
to	3,048,496	267,563	28°31′44.18″	95°44′03.79″
149. By straight line to	3,059,100	273,431	28°32′39.31″	95°42′03.10″
150. By arc centered at	3,032,622	321,278	28°40′40.2″	95°46′45.1″
to	3,060,936	274,494	28°32′49.32″	95°41′42.19″
151. By straight line to	3,078,889	285,359	28°34′31.79″	95°38′17.46″
152. By arc centered at	3,050,575	332,143	28°42′22.8″	95°43′20.2″
to	3,080,687	286,496	28°34′42.53″	95°37′56.93″
153. By straight line to	3,084,317	288,390	28°35′05.20″	95°37′15.45″
154. By straight line to	3,092,292	293,735	28°35′50.86″	95°35′44.46″
155. By arc centered at	3,063,896	340,470	28°43′41.5″	95°40′48.0″
to	3,092,642	293,950	28°35′52.89″	95°35′40.46″
156. By straight line to	3,110,764	305,148	28°37′38.45″	95°32′13.53″
157. By arc centered at	3,082,018	351,668	28°45′27.2″	95°37′20.9″
to	3,111,027	305,312	28°37′39.99″	95°32′10.52″
158. By straight line to	3,128,977	316,545	28°39′25.86″	95°28′45.39″
159. By arc centered at	3,099,968	362,901	28°47′13.2″	95°33′55.6″
to	3,129,951	317,169	28°39′31.75″	95°28′34.25″

Course	South Central Zone		Latitude	Longitude
	x	y		
160. By straight line to	3,152,061	331,678	28°41′48.68″	95°24′20.95″
161. By arc centered at	3,122,098	377,410	28°49′30.3″	95°29′42.1″
to	3,153,769	332,830	28°41′59.57″	95°24′01.60″
162. By straight line to	3,158,904	336,478	28°42′34.10″	95°23′02.71″
163. By straight line to	3,166,664	342,866	28°43′34.32″	95°21′10.91″
164. By arc centered at	3,138,717	388,622	28°51′16.3″	95°26′31.5″
to	3,172,530	345,644	28°44′00.62″	95°20′26.53″
165. By straight line to	3,177,771	349,049	28°44′32.69″	95°19′26.48″
166. By arc centered at	3,147,981	394,907	28°52′15.7″	95°24′45.2″
to	3,178,426	349,481	28°44′36.76″	95°19′18.96″
167. By straight line to	3,184,351	353,452	28°45′14.21″	95°18′11.04″
168. By arc centered at	3,153,906	398,878	28°52′53.2″	95°23′37.2″
to	3,185,298	354,101	28°45′20.34″	95°18′00.17″
169. By straight line to	3,196,291	361,808	28°46′33.16″	95°15′53.96″
170. By arc centered at	3,164,899	406,585	28°54′06.1″	95°21′30.9″
to	3,197,099	362,386	28°46′38.61″	95°15′44.67″
171. By straight line to	3,203,248	366,865	28°47′21.00″	95°14′33.99″
171a. By straight line to	3,203,445	366,995	28°47′22.22″	95°14′31.73″
172. By straight line to	3,205,264	368,190	28°47′33.46″	95°14′10.87″
173. By arc centered at	3,182,950	418,115	28°55′54.6″	95°18′03.5″
to	3,213,259	372,596	28°48′14.53″	95°12′39.45″
174. By straight line to	3,214,103	373,160	28°48′19.82″	95°12′29.76″
175. By arc centered at	3,183,794	418,677	28°55′59.9″	95°17′54.1″
to	3,230,736	390,625	28°51′07.29″	95°09′16.44″
176. By straight line to	3,240,421	399,503	28°52′31.99″	95°07′24.26″
177. By straight line to	3,258,176	414,679	28°54′56.30″	95°03′58.91″
178. By straight line to	3,262,578	418,206	28°55′29.73″	95°03′08.07″
179. By straight line to	3,266,484	420,949	28°55′55.57″	95°02′23.08″
180. By arc centered at	3,239,802	468,683	29°03′56.8″	95°07′05.4″
to	3,282,040	433,949	28°57′58.97″	94°59′23.10″
181. By straight line to	3,282,364	434,343	28°58′02.76″	94°59′19.30″
182. By arc centered at	3,240,126	469,077	29°04′00.6″	95°07′01.6″
to	3,290,005	446,661	29°00′02.05″	94°57′48.53″
183. By straight line to	3,296,652	452,104	29°00′53.63″	94°56′31.59″
184. By straight line to	3,302,419	456,606	29°01′36.20″	94°55′24.90″
185. By straight line to	3,315,160	466,352	29°03′08.22″	94°52′57.60″
186. By straight line to	3,320,930	470,564	29°03′47.89″	94°51′50.94″
187. By straight line to	3,328,195	475,602	29°04′35.19″	94°50′27.11″
188. By straight line to	3,342,587	484,679	29°05′59.91″	94°47′41.32″
189. By arc centered at	3,313,417	530,934	29°13′47.9″	94°52′51.6″
to	3,345,594	486,717	29°06′19.02″	94°47′06.62″
190. By straight line to	3,350,192	490,063	29°06′50.48″	94°46′13.45″
191. By arc centered at	3,318,015	534,280	29°14′19.4″	94°51′58.4″
to	3,351,664	491,173	29°07′00.94″	94°45′56.41″
192. By straight line to	3,366,438	502,706	29°08′49.73″	94°43′05.18″
193. By straight line to	3,373,759	508,167	29°09′41.10″	94°41′40.41″
194. By arc centered at	3,341,062	552,000	29°17′06.6″	94°47′31.2″
to	3,376,113	510,025	29°09′58.63″	94°41′13.09″
195. By straight line to	3,379,502	512,855	29°10′25.40″	94°40′33.71″
196. By arc centered at	3,344,451	554,830	29°17′33.4″	94°46′51.8″
to	3,382,463	515,517	29°10′50.64″	94°39′59.22″
197. By straight line to	3,385,938	518,877	29°11′22.61″	94°39′18.63″

Course	South Central Zone		Latitude	Longitude
	x	y		
198. By arc centered at	3,347,926	558,190	29°18′05.4″	94°46′11.2″
to	3,393,316	527,691	29°12′47.10″	94°37′51.73″
199. By straight line to	3,394,123	528,892	29°12′58.69″	94°37′42.12″
200. By arc centered at	3,348,733	559,391	29°18′17.0″	94°46′01.6″
to	3,399,047	537,969	29°14′25.68″	94°36′42.74″
201. By straight line to	3,399,847	539,848	29°14′44.97″	94°36′32.92″
202. By arc centered at	3,349,533	561,270	29°18′35.3″	94°45′51.8″
to	3,401,544	544,379	29°15′29.17″	94°36′11.86″
203. By straight line to	3,402,301	546,710	29°15′51.96″	94°36′02.32″
204. By arc centered at	3,350,290	563,601	29°18′58.1″	94°45′42.3″
to	3,404,498	556,395	29°17′26.97″	94°35′33.41″
205. By straight line to	3,404,679	557,758	29°17′40.38″	94°35′30.79″
206. By straight line to	3,405,303	558,363	29°17′46.13″	94°35′23.49″
207. By straight line to	3,407,136	559,951	29°18′01.16″	94°35′02.12″
208. By straight line to	3,409,314	561,570	29°18′16.36″	94°34′36.85″
209. By straight line to	3,413,751	564,517	29°18′43.86″	94°33′45.50″
210. By straight line to	3,421,690	569,297	29°19′28.16″	94°32′13.83″
211. By straight line to	3,429,293	573,476	29°20′06.63″	94°30′46.17″
212. By straight line to	3,447,430	582,437	29°21′28.35″	94°27′17.47″
213. By straight line to	3,466,717	591,502	29°22′51.47″	94°23′35.58″
214. By arc centered at	3,443,267	640,994	29°31′09.3″	94°27′38.8″
to	3,467,072	591,762	29°22′53.01″	94°23′31.50″
215. By straight line to	3,480,531	598,270	29°23′52.12″	94°20′56.55″
216. By straight line to	3,497,178	605,998	29°25′01.98″	94°17′44.98″
217. By arc centered at	3,474,153	655,599	29°33′21.8″	94°21′42.9″
to	3,497,402	606,145	29°25′03.31″	94°17′41.36″
218. By straight line to	3,512,863	613,309	29°26′08.92″	94°14′44.35″
219. By arc centered at	3,489,524	662,853	29°34′27.5″	94°18′45.7″
to	3,513,624	613,765	29°26′12.24″	94°14′35.58″
220. By straight line to	3,530,376	621,990	29°27′26.82″	94°11′22.44″
221. By straight line to	3,554,680	633,780	29°29′13.49″	94°06′42.17″
222. By arc centered at	3,530,811	682,981	29°37′30.0″	94°10′49.1″
to	3,555,470	634,171	29°29′17.03″	94°06′33.06″
223. By straight line to	3,571,673	642,357	29°30′31.26″	94°03′25.94″
224. By straight line to	3,579,924	646,355	29°31′07.35″	94°01′50.72″
225. By arc centered at	3,564,669	698,869	29°39′53.2″	94°04′18.2″
to	3,583,947	647,695	29°31′18.91″	94°01′04.58″
226. By arc centered at	3,570,700	700,751	29°40′09.3″	94°03′09.0″
to	3,583,971	647,701	29°31′18.96″	94°01′04.31″
227. By arc centered at	3,585,544	702,363	29°40′19.0″	94°00′20.1″
to	3,587,641	647,718	29°31′17.58″	94°00′22.79″
228. By arc centered at	3,588,465	702,397	29°40′18.1″	93°59′47.0″
to	3,597,166	648,409	29°31′20.37″	93°58′34.73″
229. By arc centered at	3,598,298	703,082	29°40′20.7″	93°57′55.3″
to	3,611,182	649,936	29°31′29.50″	93°55′55.45″
230. By arc centered at	3,616,758	704,337	29°40′25.2″	93°54′25.6″
to	3,617,960	649,666	29°31′23.90″	93°54′38.73″
231. By straight line to	3,622,052	649,757	29°31′23.04″	93°53′52.62″
232. By straight line to	3,628,661	649,851	29°31′21.11″	93°52′37.85″
233. By arc centered at	3,627,884	704,530	29°40′22.3″	93°52′19.5″
to	3,632,508	650,041	29°31′21.32″	93°51′54.24″
234. By straight line to	3,634,971	650,250	29°31′22.32″	93°51′26.29″

Course	South Central Zone		Latitude	Longitude
	x	*y*		
235. By arc centered at............	3,630,347	704,730	29°40′23.3″	93°51′51.5″
to............................	3,651,368	654,256	29°31′54.77″	93°48′18.84″
236. By straight line to............	3,653,430	655,115	29°32′02.36″	93°47′55.08″
237. By arc centered at............	3,632,410	705,598	29°40′30.9″	93°51′27.7″
to............................	3,663,602	660,681	29°32′52.93″	93°45′57.22″
238. By straight line to............	3,664,862	661,556	29°33′01.02″	93°45′42.53″
239. By arc centered at............	3,633,670	706,473	29°40′39.0″	93°51′13.0″
to............................	3,677,669	674,000	29°34′58.40″	93°43′11.30″
240. By straight line to............	3,678,810	675,546	29°35′13.18″	93°42′57.60″
241. By arc centered at............	3,634,811	708,019	29°40′53.8″	93°50′59.3″
to............................	3,680,595	678,115	29°35′37.80″	93°42′36.06″
242. By straight line to............	3,686,069	686,496	29°36′58.24″	93°41′29.83″

The State of Texas is not entitled to any interest in such lands, minerals or resources, and said State, its privies, assigns, lessees and other persons claiming under it are hereby enjoined from interfering with the rights of the United States in such lands, minerals and resources.

2. As against the United States, with the exceptions provided by § 5 of the Submerged Lands Act, 43 U. S. C. § 1313, the State of Texas is entitled to—

(a) All the lands, minerals and other natural resources underlying the Gulf of Mexico, bounded on the south by the international boundary with Mexico and on the east by the western boundary of Louisiana and an extension thereof, that are within three geographical miles from the present or future coastline as referred to in § 2 (c) of the Submerged Lands Act, 43 U. S. C. § 1301 (c); and

(b) All the lands, minerals and other natural resources underlying the Gulf of Mexico, bounded on the south by the international boundary with Mexico and on the east by the western boundary of Louisiana and an extension thereof, less than three marine leagues gulfward from the present or future coastline as referred to in § 2 (c) of the Submerged Lands Act, 43 U. S. C. § 1301 (c), that are landward of the line described in paragraph 1 (b) hereof.

3. As used herein—

(a) "Geographical mile" means a distance of 1852 meters (6076.10333 . . . U. S. Survey Feet or approximately 6076.11549 International Feet);

(b) "Marine league" means a distance of three geographical miles;

(c) Plane coordinates refer to the Texas Coordinate Systems, South Zone or South Central Zone, as indicated.

(d) Latitudes and longitudes refer to the North American 1927 Datum.

(e) All distances referred to herein are expressed at grid scale, Texas Plane Coordinate Systems.

4. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to this decree, or to the decree of December 12, 1960, herein, or to effectuate the rights of the parties in the premises.

THE CHIEF JUSTICE and MR. JUSTICE MARSHALL took no part in the consideration or formulation of this Supplemental Decree.

SOUTHERN PACIFIC CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 1050. Decided May 5, 1969.

Appeal dismissed.

Robert L. Pierce for appellant.

Mary Moran Pajalich for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted.

SOUTHERN PACIFIC CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 1152. Decided May 5, 1969.

Affirmed.

Robert L. Pierce for appellant.

Mary Moran Pajalich for appellee Public Utilities Commission of California.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted.

WAGGONER ET AL. *v.* ROSENN, SECRETARY OF PUBLIC WELFARE OF PENNSYLVANIA.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 144, Misc. Decided May 5, 1969.

286 F. Supp. 275, vacated and remanded.

William C. Sennett, Attorney General of Pennsylvania, and *Edgar R. Casper,* Deputy Attorney General, for appellee.

PER CURIAM.

The motion of appellants for leave to proceed *in forma pauperis* is granted. The judgment is vacated and the case is remanded to the United States District Court for the Middle District of Pennsylvania for further consideration in light of *Shapiro* v. *Thompson, ante,* p. 618.

RHODES *v.* KANSAS.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF SEDGWICK COUNTY, KANSAS.

No. 877, Misc. Decided May 5, 1969.

Certiorari granted; vacated and remanded.

Kent Frizzell, Attorney General of Kansas, and *E. G. Collister, Jr.,* Deputy Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the District Court of Sedgwick County, Kansas, for further consideration in light of *Smith* v. *Hooey,* 393 U. S. 374.

ROBINSON ET AL. v. JOHNSON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 67. Decided May 5, 1969.

Affirmed.

William G. Clark, Attorney General of Illinois, *Thomas E. Brannigan*, Assistant Attorney General, *John J. Stamos*, and *Daniel P. Coman* for appellants.

PER CURIAM.

The judgment is affirmed.

MR. JUSTICE BLACK dissents for the reasons given in the dissenting opinion of THE CHIEF JUSTICE in *Shapiro* v. *Thompson, ante*, p. 644.

MR. JUSTICE HARLAN dissents for the reasons given in his dissenting opinion in *Shapiro* v. *Thompson, ante*, p. 655.

MONTGOMERY, DIRECTOR, CALIFORNIA DEPARTMENT OF SOCIAL WELFARE, ET AL. *v.* BURNS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 438. Decided May 5, 1969.

Affirmed.

Thomas C. Lynch, Attorney General of California, and *Elizabeth Palmer* and *Donald B. Day,* Deputy Attorneys General, for appellants.

PER CURIAM.

The motion of appellees for leave to proceed *in forma pauperis* is granted. The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE BLACK dissents for the reasons given in the dissenting opinion of THE CHIEF JUSTICE in *Shapiro* v. *Thompson, ante,* p. 644.

MR. JUSTICE HARLAN dissents for the reasons given in his dissenting opinion in *Shapiro* v. *Thompson, ante,* p. 655.

NATIONAL TRAILER CONVOY, INC., ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA.

No. 1169. Decided May 5, 1969.

293 F. Supp. 630, affirmed.

William J. Lippman, *Robert Joyner*, and *Roland Rice* for appellants.

Solicitor General Griswold, *Assistant Attorney General McLaren*, *Robert W. Ginnane*, and *Raymond M. Zimmet* for the United States et al., and *William P. Sullivan* and *William P. Jackson, Jr.*, for appellee Contract Carrier Conference of American Trucking Assns., Inc.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 849 and 901 were intentionally omitted, in order to make it possible to publish the orders in the current advance sheets or preliminary prints of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM MARCH 10 THROUGH MAY 12, 1969.

MARCH 10, 1969.

Miscellaneous Orders.

No. —. KAPLYSH ET AL. *v.* HERSHEY ET AL.; and No. 1637, Misc. SCHWARTZ *v.* LOCAL BOARD No. 23 ET AL. C. A. 6th Cir. Applications for stays of induction presented to MR. JUSTICE STEWART, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS is of the opinion that the stays should be granted. *Ralph Rudd* for applicants Kaplysh et al. *Solicitor General Griswold* for respondents in each case in opposition.

No. 573. NATIONAL LABOR RELATIONS BOARD *v.* GISSEL PACKING CO., INC., ET AL.; and No. 691. FOOD STORE EMPLOYEES UNION, LOCAL No. 347, AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO *v.* GISSEL PACKING CO., INC. C. A. 4th Cir. [Certiorari granted, 393 U. S. 997.] Motion of American Federation of Labor & Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted. *J. Albert Woll, Laurence Gold,* and *Thomas E. Harris* on the motion.

No. 488. DANIEL ET AL. *v.* PAUL. C. A. 8th Cir. [Certiorari granted, 393 U. S. 975.] Request of the United States to participate in oral argument as *amicus curiae* granted and a total of 20 minutes allotted for that purpose. Counsel appointed to argue in support of judgment of lower court [393 U. S. 1061] shall likewise be allotted an additional 20 minutes to present oral argument in this case.

No. 1700, Misc. In re Disbarment of Sill. It is ordered that Norman E. Sill of Washington, District of Columbia, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 899. United States *v.* Interstate Commerce Commission et al.;
No. 942. Brundage et al. *v.* United States et al.;
No. 999. City of Auburn *v.* United States et al.; and
No. 1003. Livingston Anti-Merger Committee *v.* Interstate Commerce Commission et al. Appeals from D. C. D. C. [Probable jurisdiction noted, 393 U. S. 1077.] Motions of certain appellees to advance and to dispense with printing appendix denied. Mr. Justice Fortas took no part in the consideration or decision of these motions. *Robert W. Ginnane, Fritz R. Kahn,* and *Jerome Nelson* for the Interstate Commerce Commission on motion to advance and to dispense with printing appendix. *Hugh B. Cox, Ray Garrett, D. Robert Thomas, Lee B. McTurnan, Anthony Kane, Louis E. Torinus, Earl F. Requa, Frank S. Farrell, Eldon Martin,* and *Richard J. Flynn* for Great Northern Railway Co. et al. on motion to advance. *Louis B. Dailey* and *Harry Tyson Carter* for appellants Brundage et al. in opposition to motions to advance.

No. 1371, Misc. Mitchell *v.* Attorney General of the United States;
No. 1423, Misc. Montano *v.* Turner, Warden; and
No. 1453, Misc. Fournier *v.* Pinto, Prison Farm Superintendent. Motions for leave to file petitions for writs of habeas corpus denied.

No. 986. **Hiland Dairy, Inc., et al.** *v.* **Kroger Co.** C. A. 8th Cir. The Solicitor General is invited to file a brief expressing the views of the United States. Mr. Justice Fortas took no part in the consideration or decision of this order.

No. 744, Misc. **Green et al.** *v.* **United States District Court for the Southern District of Indiana et al.** Motion for leave to file petition for writ of mandamus denied. *William C. Erbecker* for petitioners.

No. 1413, Misc. **Skolnick et al.** *v.* **Mayor of Chicago et al.** Motion for leave to file petition for writ of mandamus denied. *Raymond F. Simon, Marvin E. Aspen,* and *Edmund Hatfield* for respondents Mayor of Chicago et al.

Certiorari Granted. (See No. 133, October Term, 1967, *ante,* p. 165; No. 429, Misc., *ante,* p. 216; No. 559, Misc., *ante,* p. 212; and No. 665, Misc., *ante,* p. 214.)

Certiorari Denied. (See also No. 377, *ante,* p. 212; No. 958, *ante,* p. 213; No. 961, *ante,* p. 213; No. 1072, Misc., *ante,* p. 215; and No. 1267, Misc., *ante,* p. 214.)

No. 928. **Anderson et al.** *v.* **United States.** C. A. 7th Cir. Certiorari denied. *Melvin B. Lewis* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 403 F. 2d 451.

No. 969. **Thomson** *v.* **New Hampshire.** Sup. Ct. N. H. Certiorari denied. *Lawrence H. Miller* for petitioner. Reported below: 109 N. H. 205, 247 A. 2d 179.

No. 953. Mauro *v.* United States. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 399 F. 2d 158.

No. 956. Weisblum *v.* United States. C. A. 2d Cir. Certiorari denied. *Edward J. Ennis* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Leonard H. Dickstein* for the United States. Reported below: 404 F. 2d 631.

No. 959. Crowley *v.* United States. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 405 F. 2d 400.

No. 967. Sharpe *v.* Oklahoma ex rel. Oklahoma Bar Assn. App. Div., Ct. on the Judiciary of Okla. Certiorari denied. *Charles Hill Johns* and *James F. Howell* for petitioner.

No. 972. Mustacchio *v.* United States; and

No. 973. Restaino *v.* United States. C. A. 3d Cir. Certiorari denied. *Peter S. Valentine* for petitioner in No. 973. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States in both cases. Reported below: 405 F. 2d 628.

No. 975. General Electric Co., Battery Products, Capacitor Department *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. *O. R. T. Bowden* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 400 F. 2d 713.

No. 980. Akin Distributors, Inc., of Florida *v.* United States. C. A. 5th Cir. Certiorari denied. *Lawrence A. Johnson* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Marshall Tamor Golding* for the United States. Reported below: 399 F. 2d 306.

No. 901. Barker et al. *v.* Hardway, President of Bluefield State College, et al. C. A. 4th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Melvin L. Wulf, Norman Dorsen,* and *Lewis M. Steel* for petitioners. *Chauncey H. Browning, Jr.,* Attorney General of West Virginia, and *Leo Catsonis,* Assistant Attorney General, for respondents. Reported below: 399 F. 2d 638.

Mr. Justice Fortas, concurring.

I agree that certiorari should be denied. The petitioners were suspended from college *not* for expressing their opinions on a matter of substance, but for violent and destructive interference with the rights of others. An adequate hearing was afforded them on the issue of suspension. The petitioners contend that their conduct was protected by the First Amendment, but the findings of the District Court, which were accepted by the Court of Appeals, establish that the petitioners here engaged in an aggressive and violent demonstration, and not in peaceful, nondisruptive expression, such as was involved in *Tinker* v. *Des Moines Independent Community School District,* 393 U. S. 503. The petitioners' conduct was therefore clearly not protected by the First and Fourteenth Amendments.

No. 741, Misc. Lewter *v.* Commonwealth's Attorney. Ct. App. Ky. Certiorari denied. *John B. Breckinridge,* Attorney General of Kentucky, and *George F. Rabe,* Assistant Attorney General, for respondent.

No. 732. Martin *v.* Beto, Corrections Director. C. A. 5th Cir. Certiorari denied. The Chief Justice and Mr. Justice Douglas are of the opinion that certiorari should be granted. *Clyde W. Woody* and *Marian S. Rosen* for petitioner. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Hawthorne Phillips,* Executive Assistant Attorney General, *Robert C. Flowers, Michael E. Stork,* and *Lonny F. Zwiener,* Assistant Attorneys General, and *W. V. Geppert* for respondent. Reported below: 397 F. 2d 741.

No. 971. Jackson *v.* Filliben. Sup. Ct. Del. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Louis L. Redding, Jack Greenberg, James M. Nabrit III, Michael Meltsner,* and *Melvin Zarr* for petitioner. Reported below: — Del. —, 247 A. 2d 913.

No. 1011. O'Bryan *v.* Chandler, Chief Judge, U. S. District Court. C. A. 10th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Mr. Justice Marshall took no part in the consideration or decision of this petition. *Harvey L. Davis* for petitioner. *Carl L. Shipley* for respondent. Reported below: 399 F. 2d 916.

No. 987. Alameda Conservation Assn. *v.* City of Alameda et al. Ct. App. Cal., 1st App. Dist. Motion to dispense with printing petition granted. Certiorari denied. *Neil Cunningham* for petitioner. *Lawrence D. Becker* and *William H. Orrick, Jr.,* for respondents. Reported below: 264 Cal. App. 2d 284, 70 Cal. Rptr. 264.

No. 387, Misc. Sadler *v.* Pennsylvania. C. A. 3d Cir. Certiorari denied. *James D. Crawford* and *Arlen Specter* for respondent.

No. 1030. Coleman et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Mr. Justice Marshall took no part in the consideration or decision of this petition. *George W. Nilsson* for petitioners. *Solicitor General Griswold* for the United States. Reported below: 405 F. 2d 72.

No. 605, Misc. Spinks *v.* Circuit Court of Callaway County. Sup. Ct. Mo. Certiorari denied. *Norman Anderson,* Attorney General of Missouri, and *William L. Culver,* Assistant Attorney General, for respondent.

No. 619, Misc. Evans *v.* United States; and

No. 850, Misc. Philson *v.* United States. C. A. D. C. Cir. Certiorari denied. *Gerhard P. Van Arkel* and *Eugene Gressman* for petitioner in No. 850, Misc. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States in No. 619, Misc.; and *Mr. Griswold, Mr. Vinson, Jerome M. Feit,* and *Roger A. Pauley* for the United States in No. 850, Misc. Reported below: 130 U. S. App. D. C. 114, 397 F. 2d 675.

No. 755, Misc. Alexander *v.* California. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Charles P. Just,* Deputy Attorney General, for respondent.

No. 813, Misc. Carden *v.* Russell, Warden. C. A. 6th Cir. Certiorari denied. *George F. McCanless,* Attorney General of Tennessee, for respondent.

No. 1198, Misc. Chambers et ux. *v.* Colonial Pipeline Co. Sup. Ct. Tenn. Certiorari denied.

No. 1120, Misc. CRUTCHER ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 405 F. 2d 239.

No. 1158, Misc. HYLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Acting Assistant Attorney General Kossack,* and *Beatrice Rosenberg* for the United States. Reported below: 402 F. 2d 558.

No. 1161, Misc. JACKSON *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. *Charles S. Scott* for petitioner. *Robert C. Londerholm,* Attorney General of Kansas, *Richard H. Seaton,* Assistant Attorney General, and *Robert D. Hecht* for respondent. Reported below: 201 Kan. 795, 443 P. 2d 279.

No. 1162, Misc. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Thomas G. Lilly* for petitioner. *Solicitor General Griswold, Acting Assistant Attorney General Kossack, Beatrice Rosenberg,* and *Paul C. Summitt* for the United States. Reported below: 400 F. 2d 577.

No. 1193, Misc. MCGEE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold, Acting Assistant Attorney General Kossack, Beatrice Rosenberg,* and *Sidney M. Glazer* for the United States. Reported below: 402 F. 2d 434.

No. 1183, Misc. GENOVESE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 401 F. 2d 514.

No. 851, Misc. CLAYTON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *George J. Aspland* and *Joseph F. O'Neill* for respondent.

No. 1185, Misc. SPEARS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Acting Assistant Attorney General Kossack,* and *Beatrice Rosenberg* for the United States.

No. 1200, Misc. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Robert G. Breetz* for petitioner. *Solicitor General Griswold, Acting Assistant Attorney General Kossack, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States.

No. 1216, Misc. MILLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold, Acting Assistant Attorney General Kossack, Beatrice Rosenberg,* and *Edward Fenig* for the United States.

No. 1226, Misc. BLUNT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *James L. Highsaw, Jr.,* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 131 U. S. App. D. C. 306, 404 F. 2d 1283.

No. 1261, Misc. TIPPETT *v.* SCHNECKLOTH, CONSERVATION CENTER SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 1270, Misc. BALLOU *v.* MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari denied. *Elliot L. Richardson,* Attorney General of Massachusetts, and *Howard M. Miller* and *David C. Hawkins,* Assistant Attorneys General, for respondents. Reported below: 403 F. 2d 982.

No. 1224, Misc. PEAK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Jerome M. Feit* for the United States.

No. 1221, Misc. ROBERTS *v.* COPINGER, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 1243, Misc. LEE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1246, Misc. TODD *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 433 S. W. 2d 550.

No. 1249, Misc. PEREZ *v.* FIELD, MEN'S COLONY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 1263, Misc. CAREY *v.* GEORGE WASHINGTON UNIVERSITY. C. A. D. C. Cir. Certiorari denied.

No. 1264, Misc. ALFORD *v.* VIRGINIA. C. A. 4th Cir. Certiorari denied.

No. 1265, Misc. BROWN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1272, Misc. LINDSEY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 1307, Misc. DAVIS *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 202 Kan. 61, 446 P. 2d 831.

No. 1320, Misc. CARRIER *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 402 F. 2d 294.

No. 1310, Misc. **Haines** *v.* **McDonough.** C. A. 7th Cir. Certiorari denied.

No. 1317, Misc. **Corral** *v.* **Craven, Warden.** C. A. 9th Cir. Certiorari denied.

No. 1321, Misc. **Hayes** *v.* **Pinto, Prison Farm Superintendent.** C. A. 3d Cir. Certiorari denied.

No. 1330, Misc. **Zide** *v.* **Florida.** Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 212 So. 2d 788.

No. 1331, Misc. **Bell** *v.* **New Jersey.** Sup. Ct. N. J. Certiorari denied.

No. 1334, Misc. **Vivian** *v.* **Bookbinder, Warden.** C. A. 3d Cir. Certiorari denied. *Sam Polur* for petitioner. Reported below: 403 F. 2d 156.

No. 1342, Misc. **Kamsler** *v.* **Illinois.** Sup. Ct. Ill. Certiorari denied. Reported below: 40 Ill. 2d 532, 240 N. E. 2d 590.

No. 1351, Misc. **Kagan** *v.* **California.** Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 264 Cal. App. 2d 648, 70 Cal. Rptr. 732.

No. 1355, Misc. **Fair** *v.* **Board of Elections, City of Tampa.** Dist. Ct. App. Fla., 2d Dist. Certiorari denied. *Wm. Reece Smith, Jr.,* for respondent.

No. 1391, Misc. **Morgan** *v.* **Peyton, Penitentiary Superintendent.** C. A. 4th Cir. Certiorari denied.

No. 1415, Misc. **Urtado** *v.* **Beto, Corrections Director.** C. A. 5th Cir. Certiorari denied.

No. 1340, Misc. GUNZBURGER *v.* WASHINGTON TERMINAL CO. ET AL. C. A. D. C. Cir. Certiorari denied. *Thomas A. Flannery* and *Stephen A. Trimble* for respondents.

No. 656, Misc. REECE *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant the petition for writ of certiorari and reverse on the basis of *Johnson* v. *Avery,* 393 U. S. 483. *Solicitor General Griswold* for the United States et al.

No. 1276, Misc. JENNISON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Victor Rabinowitz, Leonard B. Boudin, Michael B. Standard,* and *Dorian Bowman* for petitioner. *Solicitor General Griswold, Acting Assistant Attorney General Kossack, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 402 F. 2d 51.

Rehearing Granted. (See No. 133, October Term 1967, *ante,* p. 165.)

Rehearing Denied.

No. 44. SKINNER ET AL. *v.* LOUISIANA, 393 U. S. 473. Petition for rehearing denied.

No. 330, Misc. COLEMAN *v.* MAXWELL, WARDEN, 393 U. S. 1007. Motion for leave to file petition for rehearing denied.

MARCH 17, 1969.

Dismissals Under Rule 60.

No. 1637, Misc. SCHWARTZ *v.* LOCAL BOARD NO. 23 ET AL. C. A. 6th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court.

No. 1496, Misc. MIZE *v.* CROUSE, WARDEN. C. A. 10th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 399 F. 2d 593.

MARCH 24, 1969.

Miscellaneous Orders.

No. 163. YOUNGER, DISTRICT ATTORNEY OF LOS ANGELES COUNTY *v.* HARRIS ET AL. Appeal from D. C. C. D. Cal. [Probable jurisdiction noted, 393 U. S. 1013.] Motion of appellee Harris for leave to proceed further herein *in forma pauperis* granted. *Frank S. Pestana, A. L. Wirin, Fred Okrand,* and *Sam Rosenwein* on the motion.

No. 173. GORMAN *v.* UNITED STATES, 393 U. S. 832. In light of the Court's decision in *Alderman* v. *United States, Ivanov* v. *United States,* and *Butenko* v. *United States, ante,* p. 165, the United States is requested to file a response to petition for rehearing in this case specifically with respect to petitioner's allegation that he "appeared before the District Court where that Court summarily, without taking evidence or hearing argument, and apparently on the representation of non-materiality by the government ruled the purported log not material to the petitioner's case."

No. 798. UNITED STATES *v.* MONTGOMERY COUNTY BOARD OF EDUCATION ET AL.; and

No. 997. CARR ET AL. *v.* MONTGOMERY COUNTY BOARD OF EDUCATION ET AL. C. A. 5th Cir. [Certiorari granted, 393 U. S. 1116.] Motion of petitioners to advance granted. *Solicitor General Griswold* for the United States in No. 798 and for petitioners in No. 997. *Vaughn Hill Robison* and *Joseph D. Phelps* for respondents in both cases in opposition.

No. 573. NATIONAL LABOR RELATIONS BOARD *v.* GISSEL PACKING CO., INC., ET AL.; and

No. 691. FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO *v.* GISSEL PACKING CO., INC. C. A. 4th Cir. [Certiorari granted, 393 U. S. 997.] Motion of Associated Builders & Contractors, Inc., for leave to file a brief as *amicus curiae* granted.

No. 620. MOORE ET AL. *v.* SHAPIRO, GOVERNOR OF ILLINOIS, ET AL. Appeal from D. C. N. D. Ill. [Probable jurisdiction noted, 393 U. S. 996.] Motion of appellees for permission for two attorneys to participate in oral argument granted. *William J. Scott,* Attorney General of Illinois, on the motion.

No. 662. DEBACKER *v.* BRAINARD, SHERIFF. Appeal from Sup. Ct. Neb. [Probable jurisdiction noted, 393 U. S. 1076.] Motion of appellant for leave to proceed further herein *in forma pauperis* granted. Motion for appointment of counsel granted. It is ordered that *William G. Line, Esquire,* of Fremont, Nebraska, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for appellant in this case. Joint motion to dispense with printing appendix denied. *William G. Line* for appellant, and *Melvin Kent Kammerlohr,* Assistant Attorney General of Nebraska, for appellee on the joint motion.

No. 791. CRANE *v.* CEDAR RAPIDS & IOWA CITY RAILWAY CO. Sup. Ct. Iowa. [Certiorari granted, 393 U. S. 1047.] Motion of Railway Labor Executives' Assn. for leave to file a brief as *amicus curiae* granted. *Edward J. Hickey, Jr.,* and *James L. Highsaw, Jr.,* on the motion.

No. 1533, Misc. MCCARTNEY *v.* NELSON, WARDEN. Motion for leave to file petition for writ of habeas corpus and other relief denied.

No. 672. UNITED STATES *v.* KING. Ct. Cl. [Certiorari granted, 393 U. S. 1013.] Motion of respondent to remove case from summary calendar denied. *Neil B. Kabatchnick* on the motion.

No. 717. UNITED STATES ET AL. *v.* RADIO TELEVISION NEWS DIRECTORS ASSN. ET AL. C. A. 7th Cir. [Certiorari granted, 393 U. S. 1014.] Motion of respondents to remove case from summary calendar granted and 30 additional minutes allotted to each side. MR. JUSTICE FORTAS took no part in the consideration or decision of this motion. *Lloyd N. Cutler* for respondent Columbia Broadcasting System, Inc., and *Raymond L. Falls, Jr.*, for respondent National Broadcasting Co., Inc., on the motion.

No. 1485, Misc. WILLIAMS *v.* UNITED STATES;

No. 1558, Misc. WATERS *v.* FIELD, MEN'S COLONY SUPERINTENDENT;

No. 1567, Misc. SMITH *v.* CALIFORNIA ET AL.; and

No. 1573, Misc. HARRIS *v.* PINTO, PRISON FARM SUPERINTENDENT. Motions for leave to file petitions for writs of habeas corpus denied.

No. 785, Misc. HAILEY *v.* RUSSELL, WARDEN, ET AL. Upon suggestion of mootness by reason of death of petitioner, motion for leave to file petition for writ of habeas corpus dismissed.

No. 1215, Misc. LAUCHLI *v.* POOS, CHIEF JUDGE, U. S. DISTRICT COURT;

No. 1300, Misc. PATTON *v.* VETERANS ADMINISTRATION; and

No. 1329, Misc. LEVY *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. Motions for leave to file petitions for writs of mandamus denied. *Solicitor General Griswold* in opposition in all three cases.

No. 841. WILLIAMS *v.* CITY OF OKLAHOMA CITY ET AL. Ct. Crim. App. Okla. [Certiorari granted, 393 U. S. 998.] Motion to require certification of additional parts of the record granted. *Jon F. Gray* for petitioner on the motion.

No. 1373, Misc. MAGEE *v.* CARR, JUDGE, U. S. DISTRICT COURT, ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 1311, Misc. BROWN *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Certiorari Granted. (See also No. 28, *ante,* p. 310; No. 54, *ante,* p. 310; No. 84, *ante,* p. 310; No. 106, *ante,* p. 310; No. 124, *ante,* p. 310; No. 129, *ante,* p. 310; No. 168, *ante,* p. 310; No. 271, *ante,* p. 310; No. 317, *ante,* p. 310; No. 446, *ante,* p. 316; No. 474, *ante,* p. 310; No. 546, *ante,* p. 310; No. 668, *ante,* p. 310; No. 715, *ante,* p. 310; No. 895, *ante,* p. 310; and No. 911, *ante,* p. 310.)

No. 1014. ANDERSON'S-BLACK ROCK, INC. *v.* PAVEMENT SALVAGE CO., INC. C. A. 4th Cir. Certiorari granted. *Nathaniel L. Leek* for petitioner. *Walter J. Blenko, Jr.,* for respondent. Reported below: 404 F. 2d 450.

No. 867, Misc. COLEMAN ET AL. *v.* ALABAMA. Ct. App. Ala. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *MacDonald Gallion,* Attorney General of Alabama, and *David W. Clark,* Assistant Attorney General, for respondent. Reported below: 44 Ala. App. 429, 211 So. 2d 917.

No. 992. Ross et al., Trustees *v.* Bernhard et al. C. A. 2d Cir. Certiorari granted. *William E. Haudek* for petitioners. *Marvin Schwartz* for respondents Clark et al., *William J. Manning* for respondents Bernhard et al., and *E. Roger Frisch* for respondent Lehman Corp. Reported below: 403 F. 2d 909.

Certiorari Denied. (See also No. 84, *ante,* p. 310; No. 317, *ante,* p. 310; No. 823, *ante,* p. 319; and No. 1324, Misc., *ante,* p. 323.)

No. 720. Caci, aka Milano *v.* United States; and

No. 954. Cino *v.* United States. C. A. 2d Cir. Certiorari denied. *Nathan S. Silverberg* for petitioner in No. 720, and *Abraham Glasser* and *Peter L. Parrino* for petitioner in No. 954. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Kirby W. Patterson* for the United States in both cases. Reported below: 401 F. 2d 664.

No. 939. Tyler *v.* United States. C. A. 5th Cir. Certiorari denied. *Wesley R. Asinof* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Charles Ruff* for the United States. Reported below: 397 F. 2d 565.

No. 955. National Cash Register Co. *v.* United States. C. A. 6th Cir. Certiorari denied. *Joseph G. Blandi, C. Rudolf Peterson,* and *George W. Beatty* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Stuart A. Smith* for the United States. Reported below: 400 F. 2d 820.

No. 993. University of Illinois Foundation *v.* Winegard Co. C. A. 8th Cir. Certiorari denied. *Charles J. Merriam* for petitioner. *Keith J. Kulie* and *Donald B. Southard* for respondent. Reported below: 402 F. 2d 125.

No. 981. PILOT FREIGHT CARRIERS, INC. *v.* WALKER;

No. 1000. GASTON COUNTY DYEING MACHINE CO. *v.* BROWN; and

No. 1001. OBSERVER TRANSPORTATION CO. *v.* LEE ET AL. C. A. 4th Cir. Certiorari denied. *Whiteford S. Blakeney* for petitioner in each case. *Jack Greenberg, James M. Nabrit III, Norman C. Amaker, Conrad O. Pearson, Joseph W. Bishop, Jr.,* and *Albert J. Rosenthal* for respondents in each case. Reported below: No. 981, 405 F. 2d 645; Nos. 1000 and 1001, 405 F. 2d 887.

No. 984. CEDAR RAPIDS STEEL TRANSPORTATION, INC. *v.* IOWA STATE COMMERCE COMMISSION ET AL. Sup. Ct. Iowa. Certiorari denied. *Robert R. Rydell* for petitioner. *Leo J. Steffen, Jr.,* for Iowa State Commerce Commission, *D. C. Nolan,* for H & W Motor Express, and *Bennett A. Webster* for Rock Island Motor Transit, respondents. Reported below: — Iowa —, 160 N. W. 2d 825.

No. 989. ARNOLD *v.* MCGUINESS. C. A. 9th Cir. Certiorari denied. Reported below: 400 F. 2d 392.

No. 991. TERRY INDUSTRIES OF VIRGINIA, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. *Lawrence T. Zimmerman* and *Hugh J. Scallon* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Robert M. Lieber* for respondent. Reported below: 403 F. 2d 633.

No. 994. P. R. MALLORY & CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Frederic D. Anderson* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 400 F. 2d 956.

No. 978. AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, ET AL. *v.* TISCHLER. C. A. 5th Cir. Certiorari denied. *Wyatt Johnson* for petitioners. Reported below: 401 F. 2d 777.

No. 998. TREY PACKING, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *John J. Bracken* for petitioners. *Solicitor General Griswold* and *Arnold Ordman* for respondent. Reported below: 405 F. 2d 334.

No. 1004. COX ET AL. *v.* KATZ, CLERK OF CITY OF NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied. *Milton H. Friedman* and *Marshall Perlin* for petitioners. *J. Lee Rankin* for Katz et al., *Louis J. Lefkowitz,* Attorney General of New York, *pro se,* and *Samuel A. Hirshowitz,* First Assistant Attorney General, *George D. Zuckerman,* Assistant Attorney General, and *Philip Weinberg* for Lefkowitz, respondents. Reported below: 22 N. Y. 2d 903, 241 N. E. 2d 747.

No. 1005. HOWE *v.* GENERAL MOTORS CORP. C. A. 7th Cir. Certiorari denied. *Warren C. Horton* for petitioner. *George N. Hibben* and *Eugene W. Christen* for respondent. Reported below: 401 F. 2d 73.

No. 1007. MOGLIA *v.* GEOGHEGAN ET AL. C. A. 2d Cir. Certiorari denied. *Isidore Englander* for petitioner. *Samuel J. Cohen* for respondents. Reported below: 403 F. 2d 110.

No. 1008. DANIEL *v.* GEORGIA. Ct. App. Ga. Certiorari denied. *Albert M. Horn* and *Frank B. Stow* for petitioner. *Lewis R. Slaton* and *Joel M. Feldman* for respondent. Reported below: 118 Ga. App. 370, 163 S. E. 2d 863.

No. 1012. NATIONAL SPONGE CUSHION CO., INC. *v.* ALLEN INDUSTRIES, INC., ET AL. C. A. 3d Cir. Certiorari denied. *Sidney Neuman, William J. Birmingham,* and *Louis M. Welsh* for petitioner. *Don K. Harness* for respondents. Reported below: 403 F. 2d 717.

No. 1019. CHAS. PFIZER & CO., INC. *v.* FEDERAL TRADE COMMISSION. C. A. 6th Cir. Certiorari denied. *Arthur G. Connolly, John E. F. Wood, Thomas S. Lodge,* and *F. L. Peter Stone* for petitioner. *Solicitor General Griswold, Assistant Attorney General McLaren,* and *Jerold D. Cummins* for respondent. Reported below: 401 F. 2d 574.

No. 1020. JARKA CORP. *v.* MITSUI SEMPAKU K. K. C. A. 3d Cir. Certiorari denied. *F. Hastings Griffin, Jr.,* for petitioner. *Thomas F. Mount* for respondent. Reported below: 405 F. 2d 763.

No. 1023. RATH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *William J. MacDaniels* for petitioner. *Solicitor General Griswold* for the United States. Reported below: — F. 2d —.

No. 1025. COCHRANE *v.* LANGLOIS, WARDEN. Sup. Ct. R. I. Certiorari denied. *Milton Stanzler* and *Melvin L. Wulf* for petitioner. *Herbert F. DeSimone,* Attorney General of Rhode Island, and *Donald P. Ryan,* Assistant Attorney General, for respondent. Reported below: — R. I. —, 247 A. 2d 91.

No. 1027. WHITE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Dan L. Johnston* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 403 F. 2d 1005.

No. 1026. ZIMMERMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Bernard A. Berkman, Larry S. Gordon, Joshua J. Kancelbaum,* and *Gerald A. Messerman* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Philip R. Monahan* for the United States. Reported below: 405 F. 2d 180.

No. 1038. UNITED MEDICAL LABORATORIES, INC. *v.* COLUMBIA BROADCASTING SYSTEM, INC., ET AL. C. A. 9th Cir. Certiorari denied. *Kenneth E. Roberts* for petitioner. *Manley B. Strayer* and *Cleveland C. Cory* for respondents. Reported below: 404 F. 2d 706.

No. 1046. BARWICK ET AL. *v.* V'SOSKE ET AL. C. A. 2d Cir. Certiorari denied. *Richard Joyce Smith, Forbes D. Shaw, John V. Thornton,* and *T. David Mullen* for petitioners. *Harold L. Warner, Jr.,* and *Carl S. Rowe* for respondents. Reported below: 404 F. 2d 495.

No. 1058. CHUFF *v.* BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT #2 OF TOWNS OF FRANKFORT AND SCHUYLER ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. *Stewart T. Schantz* for petitioner. *George H. Getman* for Board of Education of Central School District #2 of Towns of Frankfort and Schuyler et al., and *John P. Jehu* for Allen et al., respondents. Reported below: 30 App. Div. 2d 590, 290 N. Y. S. 2d 936.

No. 37. MCGARRY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Edward Bennett Williams* and *Harold Ungar* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin,* and *Joseph M. Howard* for the United States. Reported below: 388 F. 2d 862.

No. 917. COCKE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Homer L. Bruce* for petitioners. *Solicitor General Griswold, Assistant Attorney General Walters, Grant W. Wiprud,* and *Stuart A. Smith* for the United States. Reported below: 399 F. 2d 433.

No. 792. BIRNBAUM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Harold F. Reis, Edward P. Taptich,* and *Alan M. Dershowitz* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. *William J. vanden Heuvel* and *Charles G. Moerdler* for St. Augustine's Episcopal School et al. as *amici curiae* in support of the petition. Reported below: 402 F. 2d 24.

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE DOUGLAS joins, dissenting.

This case raises troublesome issues concerning the federal sentencing process and its impact on the exercise of appellate rights, issues I believe we should confront because of our duty both to enforce specific congressional commands and to exercise our supervisory power over the lower federal courts.

The sentencing problems involved here arose after petitioner was convicted in the United States District Court for the Southern District of New York on two counts charging him with having conspired with others to bribe, and with having bribed, an Internal Revenue Agent. At the sentencing hearing, the District Judge noted that petitioner, who continued to maintain his innocence, was appealing his conviction; the judge therefore declined at that time to explore the relevant aspects of petitioner's character that might be taken into consideration in imposing a final sentence. Instead, the District Judge imposed a "tentative," "for the present" sentence of one year, promising to reconsider the sentence after appeal and stating that he "might" grant probation if certain conditions were adequately fulfilled. The District Judge explained his imposition of the "tentative" sentence as follows:

> "However, now is not the time to explore that phase [*i. e.,* the 'factors that might be considered in mitigation of sentence'], for you have not accepted the jury's verdict and faced up to its import. You protest your innocence and you are on the way to appeal. Certainly that is your legal right.
>
> "For the present, then, in the light of your frame of mind, let me just add that if your conviction is sustained, this Court might, and I emphasize might, upon an impressively convincing showing that you have realized, or rather realigned your sights and devoutly wish to give a hunk of yourself as well as your wealth to doing with constancy those acts which will really help your fellow Americans and at the same time enhance your personal well-being immeasurably, I say this Court might consider . . . a program of rehabilitation without confinement . . . ."

Interpreting the District Court's comments to mean that probation would be granted if the court's suggestions were followed, petitioner requested advice as to his proper course of action from a New York State judge, who had been referred to in the District Court's sentencing remarks as a person who "still believed in" petitioner. The state judge, in turn, contacted the District Judge, informing him that petitioner was having difficulty understanding how to comply with the sentencing suggestions. The District Judge responded: "Why don't you guide him? You have had a great deal of experience in charitable endeavors. . . . If you want to help him, why don't you act as his unofficial probation officer . . . ?" Agreeing to do so, the state judge introduced petitioner to three New York charities, the list of which the District Judge approved. For the following 18 months, petitioner became deeply involved with the three suggested charities and others as well, contributing a great deal of his time and over $100,000 in personal funds. When the state judge reported to the District Judge at an informal social occasion how well petitioner was progressing, the District Judge replied, "That's good, that's fine."

When petitioner's case was argued on appeal to the Court of Appeals for the Second Circuit, his counsel made some strong attacks on the District Judge's conduct of the trial and his comments and instructions to the jury. After the conviction was affirmed, petitioner moved for reduction and suspension of the tentative one-year sentence under Rule 35 of the Federal Rules of Criminal Procedure, arguing that he had fully complied with the suggested conditions. After "long and careful consideration" and "reflection seemingly without end," however, the District Court declined to reduce the original sentence. Another district judge then denied an application for probation by way of a writ of *coram nobis*. These rulings, denying the writ and the Rule 35 motion, were consolidated and affirmed on appeal to the Court of Appeals.

Certiorari should be granted, I believe, for two reasons that are inescapably clear from this record: (1) the District Judge's imposition of a "tentative" sentence clearly violated the principle, inherent in 18 U. S. C. § 4208 (b) and our decisions dealing with that statute, that a defendant must be given the option of waiting until the tentative sentence becomes final before appealing his conviction; (2) the District Judge's refusal to suspend sentence, after petitioner fully complied with the conditions laid down for such suspension, is inconsistent "with that regularity and fairness which should characterize the administration of criminal justice in the federal courts." *Saldana* v. *United States,* 365 U. S. 646, 647 (1961).

I.

I think it implicit in our rulings in *United States* v. *Behrens,* 375 U. S. 162 (1963), and the companion case of *Corey* v. *United States,* 375 U. S. 169 (1963), that a trial court's sentence must be final in every respect before an appeal need be taken, and that a district judge may impose a tentative sentence only if he follows the limitations and safeguards of 18 U. S. C. § 4208 (b). Section 4208 (b) specifically provides that a trial judge can impose a temporary sentence which "*postpones* action as to the final sentence" for the purpose of obtaining more detailed sentencing information, *United States* v. *Behrens, supra,* at 165. But we have ruled that if a trial judge proceeds under this statute, the defendant, once informed of the trial judge's intention to do so, can choose to note his appeal *either* at the time the temporary sentence is imposed (to take immediate advantage, for instance, of bail rights), *or* after the final sentence is imposed, *Corey* v. *United States, supra,* at 175. One of the reasons for allowing the defendant the discretion to defer the appellate decision until final action is taken at the trial level was pointed out in *Corey* v. *United States, supra,* at 175, and is particularly applicable here in view of petitioner's virulent attacks on the trial judge on appeal: "[A] defendant might think, rightly or wrongly, that the trial court's knowledge that an appeal had already been taken might adversely influence the court's discretion in imposing final sentence." Such a worry on a defendant's part might well inhibit him from exercising his appellate rights altogether, or from making certain arguments once he has decided to take an appeal.

It is no answer to say that petitioner acted precipitately in going ahead with his projected appeal after the trial court imposed its "for the present" sentence, for the court indicated that it had no intention of making a final decision until after the appeal was concluded, thereby depriving petitioner of his option under § 4208 (b). As it was, petitioner had cause to believe that he had been given conditional probation, a "final" sentence that would stand if he followed the conditions, and that he had better appeal then or be out of time before the Court of Appeals. Certainly the record is fairly susceptible of such an interpretation, and surely petitioner was entitled to the protection afforded by § 4208—that exercise of appellate rights would not result in a heavier, prison sentence. And even if the trial court's remarks are interpreted, at the other extreme, as imposing a one-year prison term, surely petitioner should have to serve only that sentence, without the added restraints imposed on his time during the 18 months while the appeal was pending.

Thus, no matter how the District Judge's sentencing remarks are interpreted, he exceeded his authority under § 4208 (b). If the District Judge was imposing conditional probation, he erred in revoking the probation after petitioner had fully complied with its terms; and if the District Judge was imposing a one-year prison term, he had no authority to extract, in addition, a lengthy period of probation. Moreover, as I have noted above, petitioner was justified in making the first interpretation. He was equally justified, I think, in viewing that interpretation as final to the extent that probation would be withheld only if petitioner did not comply with the conditions, and not if the District Judge happened to change his mind for reasons known only to him and based either on factors of which he was aware all along or on the nature of petitioner's appeal. For it is clear that the District Judge had before him all the necessary sentencing information, which he should have explored at the time; he therefore did not need to resort to the temporary sentencing device to obtain "more detailed information"—the "whole point of using section 4208 (b)," *United States* v. *Behrens, supra,* at 165. The charitable device used here instead to test out petitioner's rehabilitation is simply not within the purview of § 4208 (b).

II.

The District Court's "wait and see" charitable experiment was not just a violation of rules and statutes, however; it was also, in my view, a serious departure from accepted judicial behavior, the second reason why I believe certiorari should be granted. In *Saldana* v. *United States, supra,* the trial judge promised the petitioner a five-year sentence if he testified at a later trial of a co-indictee without at the same time trying to assume responsibility for a number of offenses, thereby absolving the other defendant; the second trial was never held, however, because the defendant became a fugitive, and petitioner was sentenced finally by another judge to 20 years. At the suggestion of the Solicitor General, and after an independent examination of the record, we concluded that a "due regard for the fair administration of justice" required a reversal of three counts of a five-count indictment. I think the circumstances of this case demand at least that the trial court's promise be kept and that the prison sentence be reduced to one year's probation. I cannot accept the Government's effort to distinguish *Saldana* on the grounds that the "promise" there was unequivocal, while here the trial court indicated only that it "might" reconsider the sentence.

Given his situation, petitioner had no choice but to treat the trial court's remarks as a promise and then proceed, as he did, to comply with its conditions. I cannot believe that anyone, including the District Judge who approved the manner of compliance, could expect petitioner to follow a different course of action.

The impropriety of this sentencing procedure rests not on the fact that the punishment was disproportionate to the offense because it was not. The crime could have supported a punishment greater than that accorded. Cf. *Saldana, supra.* The impropriety of the sentencing procedure rests instead on the fact that the petitioner's meaningful right of appeal was prejudiced, and that he was led to believe that if he contributed to certain charities approved by the judge, he would not be imprisoned, and that after contributing $100,000 and 18 months of personal service to them, he was told unceremoniously that his efforts were of no avail. This was neither in keeping with the statutory procedure nor with the fairness of the judicial process.

For these reasons, I would grant certiorari and, in the absence of any justification on briefing and oral argument, I would reverse the judgment.

No. 1013. ESPLIN ET AL. *v.* HIRSCHI ET UX. C. A. 10th Cir. Certiorari denied. MR. JUSTICE WHITE is of the opinion that certiorari should be granted. *Hardin A. Whitney, Jr.,* for petitioners. Reported below: 402 F. 2d 94.

No. 985. EATON *v.* HOBSON. C. A. 6th Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Milton V. Freeman, Werner J. Kronstein, William F. Snyder,* and *James J. Schiller* for petitioner. *Alexander H. Hadden* for respondent. Reported below: 399 F. 2d 781.

No. 699. DALY *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Santa Clara. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted and judgment reversed. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Stanley Fleishman* and *Sam Rosenwein* for petitioner. *Thomas C. Lynch,* Attorney General of California, *Arlo E. Smith,* Chief Assistant Attorney General, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Michael J. Phelan,* Deputy Attorney General, for respondent.

924. LEWES DAIRY, INC., ET AL. *v.* HARDIN, SECRETARY OF AGRICULTURE. C. A. 3d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *James M. Tunnell, Jr.,* and *Andrew B. Kirkpatrick, Jr.,* for petitioners. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Alan S. Rosenthal,* and *Robert E. Kopp* for respondent. Reported below: 401 F. 2d 308.

No. 1021. SCHONBRUN *v.* COMMANDING OFFICER, ARMED FORCES, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Julius B. Kuriansky* and *Emanuel Margolis* for petitioner. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Alan S. Rosenthal,* and *Ralph A. Fine* for respondents. Reported below: 403 F. 2d 371.

No. 1010. HAMPTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Albert A. Goldfarb* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States.

No. 970. YOUNG *v.* MADER ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE WHITE is of the opinion that certiorari should be granted. *Robert H. Hoffman* and *Katheleen K. Haase* for petitioner. *Lyman Brownfield* for respondents. Reported below: 402 F. 2d 158.

No. 979. BERNARD, TRUSTEE IN BANKRUPTCY *v.* BENEFICIAL FINANCE Co. C. A. 5th Cir. Certiorari denied. MR. JUSTICE WHITE is of the opinion that certiorari should be granted. *Fred Simon* for petitioner. Reported below: 402 F. 2d 796.

No. 990. ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, PACIFIC SOUTHWEST REGIONAL OFFICE *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Harry M. Plotkin, George R. Kucik, Arnold Forster, Sol Rabkin,* and *David A. Brody* for petitioner. *Solicitor General Griswold, Assistant Attorney General McLaren, Henry Geller, John H. Conlin,* and *Stuart F. Feldstein* for respondent Federal Communications Commission. Reported below: 131 U. S. App. D. C. 146, 403 F. 2d 169.

No. 1018. JOHNSON ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *William L. McGovern* and *Clifton S. Carl* for petitioners. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Morton Hollander* for the United States et al. Reported below: 402 F. 2d 778.

No. 485. Misc. MCCORMICK *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. *Norman H. Anderson,* Attorney General of Missouri, and *Maxim N. Bach,* Assistant Attorney General, for respondent. Reported below: 426 S. W. 2d 62.

No. 1054. CHILDS *v.* OREGON. Sup. Ct. Ore. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Paul R. Meyer* for petitioner. *George Van Hoomissen* and *Jacob B. Tanzer* for respondent. Reported below: — Ore. —, 447 P. 2d 304.

No. 379, Misc. THOMAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *James J. Mullins, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 394 F. 2d 247.

No. 606, Misc. SCHOONOVER *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. *Guy P. Johnson* for petitioner. *Jack P. F. Gremillion,* Attorney General of Louisiana, *William P. Schuler,* Second Assistant Attorney General, and *Frank H. Langridge* for respondent. Reported below: 252 La. 311, 211 So. 2d 273.

No. 1230, Misc. RIVERS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. *Michael F. Dillon* for respondent.

No. 1095, Misc. NELSON *v.* UNITED STATES; and
No. 1314, Misc. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States in both cases. Reported below: 401 F. 2d 521.

No. 1112, Misc. SORGI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Kirby W. Patterson* for the United States. Reported below: 401 F. 2d 664.

No. 982, Misc. ALLSTON *v.* PROSECUTING ATTORNEY ET AL. C. A. 4th Cir. Certiorari denied.

No. 1133, Misc. PABON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 387 F. 2d 351.

No. 1140, Misc. TANNENBAUM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Daniel H. Greenberg* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 401 F. 2d 644.

No. 1170, Misc. SANCHEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1173, Misc. MOORE *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 1231, Misc. KILGORE *v.* UNITED STATES; and

No. 1381, Misc. MORRIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Acting Assistant Attorney General Kossack, Beatrice Rosenberg,* and *Sidney M. Glazer* for the United States in both cases. Reported below: 403 F. 2d 627.

No. 1252, Misc. ALLSTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1237, Misc. DURHAM *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold, Acting Assistant Attorney General Kossack, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 400 F. 2d 879.

No. 1202, Misc. SKELTON *v.* UNITED STATES COURTS ET AL. C. A. 9th Cir. Certiorari denied.

No. 1241, Misc. STONE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Acting Assistant Attorney General Kossack,* and *Beatrice Rosenberg* for the United States.

No. 1258, Misc. JACKSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 401 F. 2d 659.

No. 1269, Misc. HOLMES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1273, Misc. FORTUNATO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Eugene Feldman* and *Joseph Rosenzweig* for petitioner. *Solicitor General Griswold, Acting Assistant Attorney General Kossack, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 402 F. 2d 79.

No. 1285, Misc. PRITCHETT *v.* LLOYD. C. A. 4th Cir. Certiorari denied.

No. 1287, Misc. ANGLIN *v.* MARYLAND. C. A. 4th Cir. Certiorari denied.

No. 1293, Misc. KOCHEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1337, Misc. MCCONNELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 402 F. 2d 852.

No. 1316, Misc. Boyle *v.* United States. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 402 F. 2d 757.

No. 1327, Misc. Pipes *v.* United States. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 399 F. 2d 471.

No. 1328, Misc. Green *v.* United States. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1339, Misc. Picard *v.* Allgood, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 400 F. 2d 887.

No. 1344, Misc. Principe *v.* California et al. C. A. 9th Cir. Certiorari denied.

No. 1345, Misc. Vale *v.* Russell, Warden. C. A. 5th Cir. Certiorari denied.

No. 1346, Misc. Hernandez *v.* California. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 1349, Misc. DiTommaso *v.* United States; and
No. 1350, Misc. Waugaman *v.* United States. C. A. 4th Cir. Certiorari denied. *Arnold M. Weiner* for petitioner in No. 1349, Misc., and *Edward L. Coleman* for petitioner in No. 1350, Misc. *Solicitor General Griswold* for the United States in both cases. Reported below: 405 F. 2d 385.

No. 1362, Misc. Smith *v.* Laird, Secretary of Defense. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold* for respondent. Reported below: 395 F. 2d 896.

No. 1353, Misc. **Tribble** *v.* **United States.** C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Acting Assistant Attorney General Kossack, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States.

No. 1356, Misc. **Crawford** *v.* **Russell, Warden.** C. A. 6th Cir. Certiorari denied.

No. 1357, Misc. **Bravo** *v.* **Craven, Warden.** Sup. Ct. Cal. Certiorari denied.

No. 1358, Misc. **Bynum** *v.* **United States.** C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Acting Assistant Attorney General Kossack,* and *Beatrice Rosenberg* for the United States. Reported below: 133 U. S. App. D. C. 4, 408 F. 2d 1207.

No. 1359, Misc. **Gerberding** *v.* **Minnesota.** Sup. Ct. Minn. Certiorari denied. Reported below: 282 Minn. 524, 162 N. W. 2d 204.

No. 1360, Misc. **Hays** *v.* **Procunier, Corrections Director.** C. A. 9th Cir. Certiorari denied.

No. 1364, Misc. **Handley** *v.* **Page, Warden.** C. A. 10th Cir. Certiorari denied. Reported below: 398 F. 2d 351.

No. 1375, Misc. **Meekins** *v.* **New York.** App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Joseph Calderon* for petitioner. *Frank S. Hogan* and *Michael R. Juviler* for respondent.

No. 1376, Misc. **Gaines** *v.* **California.** Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 265 Cal. App. 2d 642, 71 Cal. Rptr. 468.

No. 1377, Misc. DI NIRO *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1378, Misc. COLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Acting Assistant Attorney General Kossack, Beatrice Rosenberg,* and *Edward Fenig* for the United States.

No. 1379, Misc. AMARO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1382, Misc. LOCKHART *v.* HENDRICK, COUNTY PRISONS SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 1383, Misc. IYOTTE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Acting Assistant Attorney General Kossack, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 402 F. 2d 698.

No. 1388, Misc. BROOKMAN *v.* VIRGINIA. C. A. 4th Cir. Certiorari denied.

No. 1389, Misc. FREEMAN *v.* FRYE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 1392, Misc. ROSS *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Stewart H. Freeman,* Assistant Attorney General, for respondent.

No. 1409, Misc. GOMEZ *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *Maury Maverick, Jr.,* for petitioner. Reported below: 402 F. 2d 766.

No. 1395, Misc. Tucker *v.* Maryland. C. A. 4th Cir. Certiorari denied.

No. 1396, Misc. Walters *v.* United States. C. A. D. C. Cir. Certiorari denied. *Gary L. Cowan* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States.

No. 1398, Misc. Gordon *v.* Pennsylvania. Sup. Ct. Pa. Certiorari denied. Reported below: 431 Pa. 512, 246 A. 2d 325.

No. 1403, Misc. Jenkins *v.* Dunn et al. C. A. 6th Cir. Certiorari denied.

No. 1404, Misc. Lasiter *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 265 Cal. App. 2d 361, 71 Cal. Rptr. 218.

No. 1405, Misc. Mathews *v.* Mathews et al. Sup. Ct. Ga. Certiorari denied.

No. 1406, Misc. Daugherty *v.* Craven, Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 1411, Misc. Ames *v.* Russell, Warden, et al. C. A. 5th Cir. Certiorari denied.

No. 1414, Misc. Hickok *v.* Craven, Warden. C. A. 9th Cir. Certiorari denied.

No. 1416, Misc. Roy *v.* Manchester Gas Co. C. A. 1st Cir. Certiorari denied.

No. 1417, Misc. Bell *v.* Peyton, Penitentiary Superintendent. C. A. 4th Cir. Certiorari denied.

No. 1418, Misc. HARRIS *v.* NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied.

No. 1419, Misc. LINEBARGER *v.* PAGE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 404 F. 2d 1092.

No. 1426, Misc. MASON ET UX. *v.* LONG ISLAND SAVINGS BANK, FORMERLY LONG ISLAND CITY SAVINGS BANK. Sup. Ct. N. Y., Suffolk County. Certiorari denied. *Joseph N. Friedman* for respondent.

No. 1430, Misc. WORTHY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States.

No. 1447, Misc. FIGUEROA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1452, Misc. FOX *v.* BROWN, SECRETARY OF THE AIR FORCE, ET AL. C. A. 2d Cir. Certiorari denied. *Moses M. Falk* for petitioner. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Morton Hollander,* and *Robert E. Kopp* for respondents. Reported below: 402 F. 2d 837. [For earlier order herein, see 393 U. S. 1114.]

No. 1456, Misc. YOUNGLOVE *v.* HANNAH ET AL. Sup. Ct. Mich. Certiorari denied. *Leland W. Carr, Jr.,* for Hannah, *Frank J. Kelley,* Attorney General of Michigan, *pro se,* and *Robert A. Derengoski,* Solicitor General, and *James J. Wood,* Assistant Attorney General, for other respondents.

No. 1457, Misc. **Glass** *v.* **United States.** C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 405 F. 2d 471.

No. 1469, Misc. **Furtak** *v.* **Mancusi, Warden.** C. A. 2d Cir. Certiorari denied.

No. 1498, Misc. **Peel** *v.* **Florida.** Sup. Ct. Fla. Certiorari denied. *Harry W. Fogle* for petitioner.

No. 1218, Misc. **Pyles** *v.* **United States.** C. A. D. C. Cir. Certiorari denied. **Mr. Justice Marshall** took no part in the consideration or decision of this petition. *Solicitor General Griswold, Acting Assistant Attorney General Kossack,* and *Beatrice Rosenberg* for the United States.

Rehearing Denied.

No. 590. **Jayson et al.** *v.* **United States,** 393 U. S. 981;
No. 500, Misc. **Metze** *v.* **New York,** 393 U. S. 1091;
No. 876, Misc. **Johnson** *v.* **New York et al.,** 393 U. S. 1036;
No. 1057, Misc. **Theriault** *v.* **United States,** 393 U. S. 1100; and
No. 1208, Misc. **Vinson** *v.* **Eyman, Warden, et al.,** 393 U. S. 1075. Petitions for rehearing denied.

No. 11. **Ivanov** *v.* **United States,** *ante,* p. 165. Petition for rehearing denied. **Mr. Justice Marshall** took no part in the consideration or decision of this petition.

No. 519. **Hayutin** *v.* **United States,** 393 U. S. 961, 1045. Motion for leave to file second petition for rehearing denied.

MARCH 26, 1969.

Miscellaneous Order.

No. 770. CHIMEL *v.* CALIFORNIA. Sup. Ct. Cal. [Certiorari granted, 393 U. S. 958.] Motion of petitioner for appointment of counsel granted. It is ordered that *Keith C. Monroe, Esquire,* of Santa Ana, California, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

APRIL 1, 1969.

Miscellaneous Orders.

No. —. MARCUCILLI *v.* UNITED STATES ET AL. (C. A. 2d Cir.) Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. *Samuel J. Landau* for applicant. *Solicitor General Griswold* in opposition.

No. —. MORSE *v.* LAIRD, SECRETARY OF DEFENSE, ET AL. C. A. 9th Cir. Application for return of petitioner to the United States presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS and MR. JUSTICE FORTAS would grant the application. *Solicitor General Griswold* in opposition.

No. 463. NATIONAL LABOR RELATIONS BOARD *v.* WYMAN-GORDON CO. C. A. 1st Cir. [Certiorari granted, 393 U. S. 932.] Motion of respondent for leave to file supplemental brief after argument granted. *Quentin O. Young* on the motion.

No. 1502, Misc. URRY *v.* ARIZONA ET AL.; and

No. 1572, Misc. MUELLER *v.* CRAVEN, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 610. SULLIVAN, TAX COMMISSIONER OF CONNECTICUT, ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. [Probable jurisdiction noted, 393 U. S. 1012.] Motion of Stanley Fissel for leave to file a brief as *amicus curiae* granted. *Benjamin M. Wall* on the motion. *Robert K. Killian,* Attorney General of Connecticut, and *F. Michael Ahern, Ralph G. Murphy,* and *Richard A. Gitlin,* Assistant Attorneys General, for appellants in opposition.

No. 974. CONWAY *v.* CALIFORNIA ADULT AUTHORITY ET AL. C. A. 9th Cir. [Certiorari granted, 393 U. S. 1062.] Motion of petitioner for appointment of counsel granted. It is ordered that *Charles S. Ralston, Esquire,* of San Francisco, California, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 1084. WADE *v.* WILSON, WARDEN, ET AL. C. A. 9th Cir. [Certiorari granted, 393 U. S. 1079.] Motion of petitioner for appointment of counsel granted. It is ordered that *Marshall L. Small, Esquire,* of San Francisco, California, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 1099. ASHE *v.* SWENSON, WARDEN. C. A. 8th Cir. [Certiorari granted, 393 U. S. 1115.] Motion of petitioner for appointment of counsel granted. It is ordered that *Clark M. Clifford, Esquire,* of Washington, District of Columbia, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 1515, Misc. HANIBLE *v.* KROPP, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus denied. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Stewart H. Freeman,* Assistant Attorney General, in opposition.

No. 738, Misc. COULTER *v.* NELSON, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari denied. MR. JUSTICE FORTAS is of the opinion that in treating the papers as a petition for writ of certiorari, certiorari should be granted. *Thomas C. Lynch,* Attorney General of California, and *Robert R. Granucci* and *Horace Wheatley,* Deputy Attorneys General, for respondents.

No. 770, Misc. HANING *v.* KINNEARY, U. S. DISTRICT JUDGE; and

No. 1532, Misc. MCCARTNEY *v.* HABERKORN, JUDGE, ET AL. Motions for leave to file petitions for writs of mandamus denied.

No. 1503, Misc. LAUCHLI *v.* NOLAND, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied. *Solicitor General Griswold* in opposition.

No. 1309, Misc. WION *v.* ARRAJ, CHIEF JUDGE, U. S. DISTRICT COURT, ET AL. Motion for leave to file petition for writ of mandamus and other relief denied. *Solicitor General Griswold* in opposition.

Certiorari Granted. (See also No. 880, *ante,* p. 454; No. 1041, *ante,* p. 458; and No. 1274, Misc., *ante,* p. 457.)

No. 929. SULLIVAN ET AL. *v.* LITTLE HUNTING PARK, INC., ET AL. Sup. Ct. App. Va. Motion to use record in No. 1188, October Term, 1967, granted. Certiorari granted. *Allison W. Brown, Jr., Peter Ames Eveleth, Robert M. Alexander, Jack Greenberg,* and *James M. Nabrit III* for petitioners. *John Chas. Harris* for respondents. Reported below: 209 Va. 279, 163 S. E. 2d 588.

Certiorari Denied. (See also No. 988, *ante,* p. 455; No. 1044, *ante,* p. 456; No. 1052, *ante,* p. 454; No. 1460, Misc., *ante,* p. 457; and No. 738, Misc., *supra.*)

No. 1002. HORN *v.* CIA DE NAVEGACION FRUCO, S. A., ET AL. C. A. 5th Cir. Certiorari denied. *John H. Tappan* for petitioner. *T. K. Jackson, Jr.,* for respondents. Reported below: 404 F. 2d 422.

No. 1016. THOMAS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. *Frank B. Hester* and *Richard M. Hester* for petitioner. *Lewis R. Slaton* and *J. Robert Sparks* for respondent. Reported below: 118 Ga. App. 359, 163 S. E. 2d 850.

No. 1031. MORSE *v.* HINDMAN ET AL. C. A. 10th Cir.; and

No. 1081. MORSE *v.* HINDMAN ET AL. Sup. Ct. Kan. Certiorari denied. *Malcolm Miller* and *Robert Martin* for respondents in both cases.

No. 1042. GOULD ET UX. *v.* AMERICAN WATER WORKS SERVICE CO., INC., ET AL. Sup. Ct. N. J. Certiorari denied. *Herman A. Lingerman* for petitioners. Reported below: 52 N. J. 226, 245 A. 2d 14.

No. 1043. COHEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *John M. Bray* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, John P. Burke,* and *John M. Brant* for the United States. Reported below: 405 F. 2d 34.

No. 1080. FLUOR CORP., LTD., ET AL. *v.* CUNNYNGHAM. C. A. 5th Cir. Certiorari denied. *Henry B. Alsobrook* and *James E. Blazek* for petitioners. *Robert B. Neblett, Jr.,* for respondent. Reported below: 403 F. 2d 223.

No. 1034. Harper & Row Publishers, Inc., et al. *v.* Decker, U. S. District Judge. C. A. 7th Cir. Motion for leave to supplement record granted. Certiorari denied. *Horace S. Manges, Donald J. Williamson,* and *A. Paul Victor* for petitioners Harper & Row Publishers, Inc., et al.; *H. Templeton Brown* and *Lee N. Abrams* for petitioner William Morrow & Co., Inc.; *W. Donald McSweeney* for petitioners Bobbs-Merrill Co., Inc., et al.; *Earl A. Jinkinson* for petitioner Franklin Watts, Inc.; *Conrad W. Oberdorfer* for petitioner Houghton Mifflin Co.; *David P. List* for petitioner American News Co.; *Samuel Weisbard* for petitioner Golden Press, Inc.; *Bruce A. Hecker* for petitioner Campbell & Hall, Inc.; *Edgar E. Barton* for petitioner McGraw-Hill, Inc.; *Earl E. Pollock* for petitioner Baker & Taylor Co.; and *Leo Rosen* for petitioners Thomas Y. Crowell Co. et al. *Lee A. Freeman* for respondent and certain real parties in interest; *Paul W. Brown,* Attorney General, and *Donald Weckstein,* Assistant Attorney General, for the State of Ohio; *Chauncey H. Browning, Jr.,* Attorney General, and *Benjamin F. Yancey, Jr.,* Assistant Attorney General, for the State of West Virginia; *Kent Frizzell,* Attorney General, for the State of Kansas; *Robert W. Warren,* Attorney General, and *George F. Sieker,* Assistant Attorney General, for the State of Wisconsin; *Douglas M. Head,* Attorney General, and *Roger E. Montgomery,* Assistant Attorney General, for the State of Minnesota; *Louis J. Lefkowitz,* Attorney General, for the State of New York; *William J. Scott,* Attorney General, for the State of Illinois; *Crawford C. Martin,* Attorney General, and *Thomas W. Mack,* Assistant Attorney General, for the State of Texas; *Theodore L. Sendak,* Attorney General, for the State of Indiana; *Raymond F. Simon* for the City of Chicago; *J. Lee Rankin* for the City of New York; *Harold E. Kohn* and *David Berger* for the City of Philadelphia et al.; *John A.*

Murray for the City of St. Paul et al.; and *David J. Young* for Archbishop and Bishops of the Six Dioceses in Ohio, certain real parties in interest.

No. 1028. VICK ET AL. *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. *Fred M. Winner* for petitioners. Reported below: — Colo. —, 445 P. 2d 220.

No. 1051. FORREST *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *Calvin W. Breit* for petitioner. *Jefferson B. Brown* for respondent.

No. 1073. KOZAK *v.* KOZAK. App. Ct. Ill., 1st Dist. Certiorari denied. *Franklin J. Kramer* for petitioner. *Burton Y. Weitzenfeld* for respondent. Reported below: 98 Ill. App. 2d 477, 240 N. E. 2d 155.

No. 1102. WESTERN TREE FARMS, INC., ET AL. *v.* HOOD RIVER COUNTY. Sup. Ct. Ore. Certiorari denied. *Ervin W. Potter* for petitioners. Reported below: — Ore. —, —, —, 448 P. 2d 518, 519, 520.

No. 1056. BOOTH ET AL. *v.* UNITED STATES. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. *Guy B. Scott, Jr.,* for petitioners. *Solicitor General Griswold* for the United States. Reported below: 404 F. 2d 1096.

No. 762, Misc. PAGAN-CRUZ *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Manuel Nelson Zapata* for petitioner. *Eugene Gold* and *Harold M. Brown* for respondent.

No. 1283, Misc. FERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 401 F. 2d 183.

No. 1057. Wolfson et al. *v.* United States. C. A. 2d Cir. Certiorari denied. Mr. Justice Fortas took no part in the consideration or decision of this petition. *William O. Bittman* and *E. Barrett Prettyman, Jr.*, for Wolfson, and *Milton V. Freeman* and *Edgar H. Brenner* for Gerbert, petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 405 F. 2d 779.

No. 1074. American Home Assurance Co. *v.* Spicer et al. C. A. 5th Cir. Motion to dispense with printing respondents' brief denied. Certiorari denied. *Anthony J. Siciliano* for petitioner. *James Harold Weeks* for respondents. Reported below: 402 F. 2d 988.

No. 804, Misc. Schutz *v.* United States. C. A. 10th Cir. Certiorari denied. *Max P. Flusche, Jr.*, for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Jerome M. Feit* for the United States. Reported below: 395 F. 2d 225.

No. 1004, Misc. Aceves *v.* California et al. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Timothy A. Reardon,* Deputy Attorney General, for respondents.

No. 1209, Misc. Cecchini *v.* United States. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 402 F. 2d 924.

No. 1436, Misc. Harris *v.* Pennsylvania. Sup. Ct. Pa. Certiorari denied. *Mary Bell Hammerman* for petitioner.

No. 1262, Misc. MUTTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *James L. Mayson* for petitioner. *Solicitor General Griswold, Acting Assistant Attorney General Kossack,* and *Beatrice Rosenberg* for the United States. Reported below: 400 F. 2d 183.

No. 1281, Misc. JONES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Stanley A. Bass* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 403 F. 2d 498.

No. 1291, Misc. PALUMBO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 401 F. 2d 270.

No. 1299, Misc. MURDOCK *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1305, Misc. COLON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States.

No. 1308, Misc. FEARING *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 403 F. 2d 60.

No. 1341, Misc. MALONEY ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Francis J. Kiernan* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 402 F. 2d 448.

No. 1365, Misc. MALONEY *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 152 W. Va. 437, 164 S. E. 2d 205.

No. 1385, Misc. HAYES *v.* DIRECTOR, PATUXENT INSTITUTION. Ct. Sp. App. Md. Certiorari denied.

No. 1394, Misc. GRAY *v.* RUSSELL, WARDEN. C. A. 6th Cir. Certiorari denied. *George F. McCanless,* Attorney General of Tennessee, for respondent. Reported below: 403 F. 2d 59.

No. 1400, Misc. VENEY *v.* MARYLAND. Ct. App. Md. Certiorari denied. *Daniel E. Klein, Jr.,* for petitioner. *Francis B. Burch,* Attorney General of Maryland, *Edward F. Borgerding,* First Assistant Attorney General, and *Thomas N. Biddison, Jr.,* Assistant Attorney General, for respondent. Reported below: 251 Md. 182, 246 A. 2d 568.

No. 1431, Misc. WILLIAMS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 1401, Misc. VENEY *v.* MARYLAND. Ct. App. Md. Certiorari denied. *Daniel E. Klein, Jr.,* for petitioner. *Francis B. Burch,* Attorney General of Maryland, *Edward F. Borgerding,* First Assistant Attorney General, and *Thomas N. Biddison, Jr.,* Assistant Attorney General, for respondent. Reported below: 251 Md. 159, 246 A. 2d 608.

No. 1433, Misc. WILLIAMS *v.* PROCUNIER, CORRECTIONS DIRECTOR. C. A. 9th Cir. Certiorari denied.

No. 1437, Misc. ADAMS *v.* CAMERON, HOSPITAL SUPERINTENDENT. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for respondent.

No. 1434, Misc. Clarke *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1439, Misc. Baker *v.* Nebraska. Sup. Ct. Neb. Certiorari denied. *Richard J. Bruckner* for petitioner. Reported below: 183 Neb. 499, 161 N. W. 2d 864.

No. 1444, Misc. Metz *v.* Maroney, Correctional Superintendent. C. A. 3d Cir. Certiorari denied. Reported below: 404 F. 2d 233.

No. 1446, Misc. Swanson *v.* Pennsylvania. Sup. Ct. Pa. Certiorari denied. Reported below: 432 Pa. 293, 248 A. 2d 12.

No. 1448, Misc. Barefield *v.* United States. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 403 F. 2d 647.

No. 1435, Misc. Valenzuela *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1451, Misc. Garrett *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 434 S. W. 2d 142.

No. 1455, Misc. Garnett *v.* United States. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 404 F. 2d 26.

No. 1463, Misc. Ehrlich *v.* Illinois et al. C. A. 7th Cir. Certiorari denied.

No. 1466, Misc. Dickerson *v.* Lee. C. A. 5th Cir. Certiorari denied.

No. 1465, Misc. Mason *v.* United States. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 402 F. 2d 732.

No. 1471, Misc. Conrad *v.* California. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 1472, Misc. Chavez *v.* Baker, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 399 F. 2d 943.

No. 1473, Misc. Lott *v.* Baker, Warden. C. A. 10th Cir. Certiorari denied.

No. 1478, Misc. Konczak *v.* Meehan et al. C. A. 7th Cir. Certiorari denied.

No. 1479, Misc. Douglas *v.* Perini, Correctional Superintendent. C. A. 6th Cir. Certiorari denied.

No. 1480, Misc. Pierce *v.* Turner, Warden. C. A. 10th Cir. Certiorari denied. *Delbert M. Draper, Jr.*, for petitioner. Reported below: 402 F. 2d 109.

No. 1484, Misc. Cantrell *v.* Alabama. Sup. Ct. Ala. Certiorari denied. *Fred Blanton, Jr.*, for petitioner. *MacDonald Gallion,* Attorney General of Alabama, and *Robert P. Bradley* and *Walter S. Turner,* Assistant Attorneys General, for respondent. Reported below: 283 Ala. 225, 215 So. 2d 440.

No. 1487, Misc. Holquin *v.* Arizona et al. C. A. 9th Cir. Certiorari denied.

No. 1494, Misc. Carter *v.* Superior Court of California, County of San Bernardino. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 1488, Misc. Cota *v.* Field, Men's Colony Superintendent. Sup. Ct. Cal. Certiorari denied.

No. 1489, Misc. Hancock *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied. *George F. McCanless,* Attorney General of Tennessee, and *C. Hayes Cooney,* Assistant Attorney General, for respondent.

No. 1495, Misc. Rios-Ramirez *v.* United States. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 403 F. 2d 1016.

No. 1497, Misc. McFalls *v.* Peyton, Penitentiary Superintendent. C. A. 4th Cir. Certiorari denied. Reported below: 401 F. 2d 890.

No. 1506, Misc. Hillery *v.* California. C. A. 9th Cir. Certiorari denied.

No. 1505, Misc. Harshaw *v.* Field, Men's Colony Superintendent, et al. C. A. 9th Cir. Certiorari denied.

No. 1507, Misc. Johnson *v.* Virginia. C. A. 4th Cir. Certiorari denied.

No. 1508, Misc. Cortman *v.* Oregon. Sup. Ct. Ore. Certiorari denied. Reported below: 251 Ore. 566, 446 P. 2d 681.

No. 1514, Misc. Bell *v.* Peyton, Penitentiary Superintendent. C. A. 4th Cir. Certiorari denied.

No. 1516, Misc. Andrews *v.* Peyton, Penitentiary Superintendent. C. A. 4th Cir. Certiorari denied.

No. 508, Misc. JOHNSON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Lawrence A. Aschenbrenner* for petitioners. *Louis F. Claiborne,* Deputy Solicitor General, for the United States. Reported below: 394 F. 2d 984.

MR. JUSTICE MARSHALL, with whom MR. CHIEF JUSTICE WARREN joins, dissenting.

Petitioners were convicted of disorderly conduct in a federal recreational area after a jury trial in the United States District Court for the Southern District of Mississippi.[*] Specifically, they were charged with making "offensively coarse utterances and gestures and . . . addressing abusive language" to a group of people using the recreational area. In his charge to the jury, the trial judge simply read the regulation under which petitioners were charged, without defining or limiting any of the terms contained therein. There was no objection to the charge. On appeal, petitioners challenged the sufficiency of the evidence. Petitioners raise several challenges to the validity of their convictions in their petition before this Court.

The Government, without conceding the more extreme of petitioners' arguments, does not oppose granting the writ and reversing the judgments of conviction on the ground that the minimal instructions given the jury make it "quite possible that the present convictions rest upon an unacceptably broad reading of the regulation," and that such a defect can be noticed by this Court even though no objection was made to the instruction in the trial court. Fed. Rules Crim. Proc. 30, 52 (b).

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[*] The applicable regulation, 36 CFR § 2.7, provides in part:

"§ 2.7. Disorderly conduct.

"(a) Disorderly conduct is prohibited.

"(b) Offense defined: A person is guilty of disorderly conduct if, with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he shall:

. . . . .

"(2) Make unreasonable noise or offensively coarse utterance, gesture, or display, or address abusive language to any person present."

I agree. Accordingly, I would grant the writ and reverse the judgment of conviction.

No. 1519, Misc. BECTON *v.* WILLINGHAM, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 1524, Misc. ESTRADA *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Leon B. Polsky* for petitioner.

No. 1525, Misc. ELDER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. *Reuben A. Garland* for petitioner. Reported below: 224 Ga. 704, 164 S. E. 2d 118.

No. 1530, Misc. HOLMES *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1534, Misc. BLYTHER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: — U. S. App. D. C. —, 407 F. 2d 1279.

No. 1542, Misc. NOLTIMIER *v.* NOLTIMIER. Sup. Ct. Minn. Certiorari denied. Reported below: 282 Minn. 526, 162 N. W. 2d 707.

No. 1551, Misc. WILLIAMS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 1552, Misc. ROBINSON *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1553, Misc. JORDAN *v.* VIRGINIA. C. A. 4th Cir. Certiorari denied.

No. 1563, Misc. MASTERS *v.* IOWA. Sup. Ct. Iowa. Certiorari denied.

No. 757, Misc. HEATH *v.* PATTERSON, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE FORTAS, and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. *Benton S. Clark, Jr.,* and *Robert G. Hanson* for petitioner. *Duke W. Dunbar,* Attorney General of Colorado, *John P. Moore,* Deputy Attorney General, and *George E. DeRoos,* Assistant Attorney General, for respondents.

No. 1372, Misc. KOPETKA *v.* YOUNG, WARDEN. Sup. Ct. Minn. Certiorari and other relief denied. Reported below: 282 Minn. 529, 163 N. W. 2d 49.

No. 1412, Misc. MILLS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States.

No. 1475, Misc. BARNETT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States.

No. 1547, Misc. TREST *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States.

No. 1490, Misc. De la Cruz-Martinez *v.* Immigration and Naturalization Service. C. A. 9th Cir. Certiorari denied. Mr. Justice Fortas is of the opinion that certiorari should be granted. *Stella Gramer* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Philip R. Monahan* for respondent. Reported below: 404 F. 2d 1198.

Rehearing Denied.

No. 735. Brady *v.* Trans World Airlines, Inc., et al., 393 U. S. 1048;

No. 742, Misc. Johnson *v.* California, 393 U. S. 991;

No. 1280, Misc. Furtak *v.* New York, 393 U. S. 1122;

No. 1335, Misc. Furtak *v.* Mancusi, Warden, 393 U. S. 1123;

No. 1369, Misc. Furtak *v.* Mancusi, Warden, 393 U. S. 1123; and

No. 1340, Misc. Gunzburger *v.* Washington Terminal Co. et al., *ante,* p. 912. Petitions for rehearing denied.

No. 735, Misc. Hopkins *v.* United States, 393 U. S. 1032; and

No. 791, Misc. Peabody *v.* United States, 393 U. S. 1033. Motions for leave to file petitions for rehearing denied.

April 2, 1969.

Dismissal Under Rule 60.

No. 820. Phelps *v.* Missouri-Kansas-Texas Railroad Co. Sup. Ct. Mo. [Certiorari granted, 393 U. S. 1061.] Writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *John H. Haley, Jr., James T. Williamson,* and *Thomas J. Conway* for petitioner. *Howard A. Crawford* for respondent.

Miscellaneous Order.

No. 436. RODRIGUE ET AL. *v.* AETNA CASUALTY & SURETY CO. ET AL. C. A. 5th Cir. [Certiorari granted, 393 U. S. 932.] The parties and the Solicitor General as *amicus curiae* are invited to file further briefs within 30 days addressing the following question: "In light of the cases in this Court relating to the limits of admiralty jurisdiction, such as *Phoenix Construction Co.* v. *The Steamer Poughkeepsie,* 212 U. S. 558, affirming 162 F. 494 (D. C. S. D. N. Y. 1908), and in light of the language and legislative history of the Outer Continental Shelf Lands Act, does the Death on the High Seas Act apply to these accidents?" See *Pure Oil Co.* v. *Snipes,* 293 F. 2d 60 (C. A. 5th Cir. 1961).

APRIL 7, 1969.

Miscellaneous Orders.

No. ——. YOUNG *v.* MCGEE. C. A. 9th Cir. Application for bail denied.

No. 1675, Misc. SAAVEDRA *v.* CONNECTICUT. Sup. Ct. Conn. Application for stay and for admission to bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. 1655, Misc. IN RE ADAMS. Motion for leave to file petition for writ of habeas corpus denied.

No. 1620, Misc. DAYE *v.* LARKINS. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted or Postponed.

No. 1064. NORTH CAROLINA *v.* ALFORD. Appeal from C. A. 4th Cir. Motion of appellee for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. *Robert B. Morgan,* Attorney General of North Carolina, and *Andrew A. Vanore, Jr.,* for appellant. Reported below: 405 F. 2d 340.

No. 876. MANN *v.* VERMONT EDUCATIONAL BUILDINGS FINANCING AGENCY. Appeal from Sup. Ct. Vt. Motion of College of Saint Joseph the Provider for leave to file brief as *amicus curiae* granted. Further consideration of question of jurisdiction in this case postponed to hearing of case on the merits. Parties are directed to express their views as to whether there is presented a genuine case or controversy. *Neil J. Cohen* for appellant. *Chester S. Ketcham* for appellee. *Edward Bennett Williams* and *Charles Ryan* on the motion. Reported below: 127 Vt. 262, 247 A. 2d 68.

No. 909, Misc. SIMMONS ET UX. *v.* WEST HAVEN HOUSING AUTHORITY. Appeal from App. Div., Cir. Ct. Conn. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted and case transferred to appellate docket. *Francis X. Dineen* for appellants. *John J. Philbin, Dennis J. Donahue, Jr.,* and *Louis Smith Votto* for appellee. Reported below: 5 Conn. Cir. 282, 250 A. 2d 527

Certiorari Granted. (See also No. 1146, Misc., *ante,* p. 574; and No. 1425, Misc., *ante,* p. 575.)

No. 1024. UNITED STATES *v.* WHITE. C. A. 7th Cir. Certiorari granted. *Solicitor General Griswold* for the United States. *Morris A. Shenker* for respondent. Reported below: 405 F. 2d 838.

No. 1079. BAIRD *v.* STATE BAR OF ARIZONA. Sup. Ct. Ariz. Certiorari granted. *John P. Frank* for petitioner. *Mark Wilmer* for respondent.

No. 691, Misc. HESTER *v.* ILLINOIS. Sup. Ct. Ill. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Marshall Kaplan* for petitioner. *William J. Scott,* Attorney General of Illinois, and *John J. O'Toole,* Assistant Attorney General, for respondent. Reported below: 39 Ill. 2d 489, 237 N. E. 2d 466.

No. 861. ZUBER ET AL. *v.* ALLEN ET AL.; and

No. 1076. HARDIN, SECRETARY OF AGRICULTURE *v.* ALLEN ET AL. C. A. D. C. Cir. Certiorari granted. Cases consolidated and a total of two hours allotted for oral argument. MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions. *Lawrence D. Hollman* and *Carlyle C. Ring, Jr.,* for petitioners in No. 861, and *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Alan S. Rosenthal* for petitioner in No. 1076. *Charles P. Ryan* and *Edward J. Ryan* for respondents in both cases. Briefs of *amicus curiae* in support of the petition in No. 861 were filed by *Elliot L. Richardson,* Attorney General, and *Charles M. Burnim,* Assistant Attorney General, for the State of Massachusetts; *Robert K. Killian,* Attorney General, and *Michael J. Scanlon,* Assistant Attorney General, for the State of Connecticut; and *Herbert F. DeSimone,* Attorney General, and *Charles G. Edwards,* Assistant Attorney General, for the State of Rhode Island. A brief was filed by *James M. Jeffords,* Attorney General, for the State of Vermont as *amicus curiae* in opposition to the petitions in both cases. Reported below: 131 U. S. App. D. C. 109, 402 F. 2d 660.

Certiorari Denied. (See also No. 844, *ante,* p. 573; No. 857, *ante,* p. 573; and No. 984, Misc., *ante,* p. 574.)

No. 944. FINCHUM *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *James T. Edmunds* for petitioner. *William F. Watkins, Jr.,* for respondent.

No. 1049. WEATHERFORD OIL TOOL CO., INC., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *George H. Jewell, Jr.,* for petitioners. *Solicitor General Griswold, Assistant Attorney General Walters, Crombie J. D. Garrett,* and *Loring W. Post* for the United States. Reported below: 403 F. 2d 344.

No. 1015. Allen *v.* Georgia. Ct. App. Ga. Certiorari denied. *Frank B. Hester* and *Richard M. Hester* for petitioner. *Lewis R. Slaton* for respondent. Reported below: 118 Ga. App. 354, 163 S. E. 2d 839.

No. 1062. Riso *v.* United States. C. A. 7th Cir. Certiorari denied. *Anna R. Lavin* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 405 F. 2d 134.

No. 1065. Crockett et al. *v.* Illinois. Sup. Ct. Ill. Certiorari denied. *Leo E. Holt* for petitioners. Reported below: 41 Ill. 2d 226, 242 N. E. 2d 235.

No. 1066. Rosen et al. *v.* Eastern Airlines, Inc. C. A. 5th Cir. Certiorari denied. *Leonard Moriber* for petitioners. *W. Glen Harlan* and *E. Smythe Gambrell* for respondent. Reported below: 400 F. 2d 462.

No. 1068. Phoenix Newspapers, Inc., et al. *v.* Church. Sup. Ct. Ariz. Certiorari denied. *Mark Wilmer* for petitioners. Reported below: 103 Ariz. 582, 447 P. 2d 840.

No. 1072. Karcher *v.* United States. C. A. 5th Cir. Certiorari denied. *Jack J. Taffer* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Edward Fenig* for the United States. Reported below: 404 F. 2d 343.

No. 1077. Williams *v.* United States. C. A. 9th Cir. Certiorari denied. *Charles M. Berg* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 406 F. 2d 704.

No. 1082. OHIO CITIZENS TRUST CO., TRUSTEE, ET AL. *v.* LEAR JET CORP. C. A. 10th Cir. Certiorari denied. *Myron C. Cass* for petitioners. *Malcolm Miller* and *Truman S. Safford* for respondent. Reported below: 403 F. 2d 956.

No. 1086. MICR-SHIELD CO. ET AL. *v.* FIRST NATIONAL BANK OF MIAMI. C. A. 5th Cir. Certiorari denied. *Frederick Bernays Wiener* and *William H. Drummond* for petitioners. *Phillip Goldman* for respondent. Reported below: 404 F. 2d 157.

No. 1087. ASHTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *J. B. Tietz* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 404 F. 2d 95.

No. 1088. OFFSHORE CO. *v.* G & H OFFSHORE TOWING CO. C. A. 5th Cir. Certiorari denied. *Robert M. Julian* for petitioner. *M. L. Cook* for respondent. Reported below: 403 F. 2d 715.

No. 1097. HICKMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Joseph H. Davis* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 406 F. 2d 414.

No. 358. DOUGLAS ET AL. *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Alan M. Dershowitz* and *Joseph S. Oteri* for petitioners. *Elliot L. Richardson,* Attorney General of Massachusetts, and *Howard M. Miller,* Assistant Attorney General, for respondent. Reported below: 354 Mass. 212, 236 N. E. 2d 865.

No. 1182. Yeager, Principal Keeper *v.* Schultz. C. A. 3d Cir. Certiorari denied. *Thomas P. Ford, Jr.,* for petitioner. Reported below: 403 F. 2d 639.

No. 784. Sandbank *v.* United States. C. A. 2d Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Stanley Faulkner* for petitioner. *Solicitor General Griswold, Acting Assistant Attorney General Kossack, Beatrice Rosenberg,* and *Jerome M. Feit* for the United States. Reported below: 403 F. 2d 38.

No. 893. Kons *v.* Tahash, Warden. Sup. Ct. Minn. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Robert Wm. Rischmiller* for petitioner. *Douglas M. Head,* Attorney General of Minnesota, *Richard H. Kyle,* Solicitor General, and *Arne L. Schoeller,* Assistant Attorney General, for respondent. Reported below: 281 Minn. 467, 161 N. W. 2d 826.

No. 977. Wright *v.* Washington. Sup. Ct. Wash. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *R. Max Etter, Sr.,* for petitioner. *George A. Kain* for respondent. Reported below: 74 Wash. 2d 355, 444 P. 2d 676.

No. 52, Misc. Roberts *v.* Nelson, Warden. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Edward P. O'Brien* and *Charles R. B. Kirk,* Deputy Attorneys General, for respondent. Reported below: 387 F. 2d 632.

No. 534, Misc. Johnson *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. *Lawrence Herman* for petitioner. *Lee C. Falke* for respondent.

No. 1039. GAIR *v.* GILL ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Motion to dispense with printing petition granted. Certiorari denied. *Vito F. Lanza* for petitioner. *Irving Kirschenbaum* for respondents. *Leon Leighton,* Guardian ad Litem, in opposition.

No. 562, Misc. RODRIQUEZ *v.* NELSON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Edward P. O'Brien, Derald E. Granberg,* and *Jerome C. Utz,* Deputy Attorneys General, for respondents.

No. 776, Misc. RHODES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Robert S. Bailey* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Ronald L. Gainer* for the United States. Reported below: 398 F. 2d 655.

No. 929, Misc. WALKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 397 F. 2d 789.

No. 1315, Misc. SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 401 F. 2d 771.

No. 1380, Misc. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Acting Assistant Attorney General Kossack, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 401 F. 2d 769.

No. 1018, Misc. GARZA-FUENTES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *David Hume* for petitioner Garza-Fuentes. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 400 F. 2d 219.

No. 1366, Misc. PEARSON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Thomas J. Mackell* and *Peter J. O'Connor* for respondent.

No. 1386, Misc. MILLER *v.* UNITED STATES; and
No. 1402, Misc. VALLEE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Leonard,* and *Nathan Lewin* for the United States in both cases. Reported below: 404 F. 2d 611.

No. 1393, Misc. MARES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 409 F. 2d 1083.

No. 1407, Misc. SMITH, AKA JEFFRIES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States.

No. 1458, Misc. MALBRUE *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 1474, Misc. BARRETT *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 267 Cal. App. 2d 135, 72 Cal. Rptr. 681.

No. 1464, Misc. Peek *v.* United States. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States.

No. 1476, Misc. Elder *v.* Boles, Warden. C. A. 4th Cir. Certiorari denied.

No. 1511, Misc. Cinnamon *v.* Eaton, Sheriff. C. A. 6th Cir. Certiorari denied.

No. 1512, Misc. Parga *v.* United States. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 404 F. 2d 878.

No. 1520, Misc. Bronson *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied. *I. A. Kanarek* for petitioner. Reported below: 263 Cal. App. 2d 831, 70 Cal. Rptr. 162.

No. 1523, Misc. Jackson *v.* Craven, Warden. C. A. 9th Cir. Certiorari denied.

No. 1527, Misc. Ortega-Lira *v.* United States. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 406 F. 2d 834.

No. 1538, Misc. Clemons *v.* United States. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 133 U. S. App. D. C. 27, 408 F. 2d 1230.

No. 1535, Misc. **Franklin** *v.* **New Mexico.** Sup. Ct. N. M. Certiorari denied. *W. D. Girand, Jr.*, for petitioner. *James A. Maloney,* Attorney General of New Mexico, and *James V. Noble,* Assistant Attorney General, for respondent. Reported below: 79 N. M. 608, 446 P. 2d 883.

No. 1526, Misc. **Schweitzer** *v.* **Kropp, Warden, et al.** C. A. 6th Cir. Certiorari denied.

No. 1529, Misc. **Anderson** *v.* **Page, Warden, et al.** C. A. 10th Cir. Certiorari denied.

No. 1544, Misc. **Tassone** *v.* **Illinois.** Sup. Ct. Ill. Certiorari denied. *Albert I. Zemel* for petitioner. Reported below: 41 Ill. 2d 7, 241 N. E. 2d 419.

No. 1555, Misc. **Anderson** *v.* **United States.** C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 405 F. 2d 492.

No. 1564, Misc. **Rhodes** *v.* **Lumbermens Mutual Casualty Co.** C. A. 10th Cir. Certiorari denied. *John R. Baylor* for respondent. Reported below: 403 F. 2d 2.

No. 1571, Misc. **Propp** *v.* **Craven, Warden.** C. A. 9th Cir. Certiorari denied.

No. 1608, Misc. **Montague** *v.* **Rhay, Penitentiary Superintendent.** Sup. Ct. Wash. Certiorari denied.

No. 1593, Misc. **Adams** *v.* **Brenner, Commissioner of Patents.** C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for respondent.

No. 1610, Misc. DELGADO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 403 F. 2d 208.

No. 1609, Misc. BENNETT *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 406 F. 2d 36.

No. 1613, Misc. ANDERSON *v.* PINTO, PRISON FARM SUPERINTENDENT, ET AL. Sup. Ct. N. J. Certiorari denied.

No. 640, Misc. LUNA *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *John J. Browne* for petitioner. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Robert C. Flowers* and *Lonny F. Zwiener,* Assistant Attorneys General, and *W. V. Geppert* for respondent. Reported below: 395 F. 2d 35.

No. 1138, Misc. CLEAVER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Sidney M. Glazer* for the United States. Reported below: 402 F. 2d 148.

No. 1266, Misc. TZANTARMAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Solicitor General Griswold, Acting Assistant Attorney General Kossack,* and *Beatrice Rosenberg* for the United States. Reported below: 402 F. 2d 163.

Rehearing Denied.

No. 262. **Naples** *v.* **Maxwell, Warden,** 393 U. S. 1080;

No. 587. **Shelton** *v.* **Stynchcombe, Sheriff,** 393 U. S. 1089;

No. 851. **Gefen** *v.* **United States,** 393 U. S. 1119;

No. 882. **Reddy** *v.* **United States,** 393 U. S. 1085;

No. 885. **Holt** *v.* **United States,** 393 U. S. 1086;

No. 903. **Bailey's Bakery, Ltd.** *v.* **Continental Baking Co. et al.,** 393 U. S. 1086;

No. 909. **Hahn** *v.* **Kentucky Alcoholic Beverage Control Board et al.,** 393 U. S. 1086;

No. 1185, Misc. **Spears** *v.* **United States,** *ante,* p. 909;

No. 1198, Misc. **Chambers et ux.** *v.* **Colonial Pipeline Co.,** *ante,* p. 907;

No. 1330, Misc. **Zide** *v.* **Florida,** *ante,* p. 911; and

No. 1342, Misc. **Kamsler** *v.* **Illinois,** *ante,* p. 911. Petitions for rehearing denied.

No. 879. **Henzel** *v.* **Florida,** 393 U. S. 1085. Petition for rehearing denied. **Mr. Justice Fortas** took no part in the consideration or decision of this petition.

No. 878. **Serta Associates, Inc.** *v.* **United States,** 393 U. S. 534. Petition for rehearing denied. **Mr. Justice White** took no part in the consideration or decision of this petition.

Assignment Order.

An order of **The Chief Justice** designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Customs and Patent Appeals on April 9, 1969, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

APRIL 21, 1969.

Miscellaneous Orders.

No. ——. NEGRE *v.* LARSEN, COMMANDING GENERAL, ET AL. C. A. 9th Cir. Application for stay and alternative writ of mandate presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. *Solicitor General Griswold* in opposition.

MR. JUSTICE DOUGLAS, dissenting.

Petitioner, a member of the Armed Forces who was inducted in August 1967, applied for discharge as a conscientious objector in January 1969.

The Army hearing officer recommended that petitioner be discharged as a religiously motivated CO. But the Army denied relief. Petitioner then appealed to the Army Board for Correction of Military Records, which denied relief.

Meanwhile petitioner filed a petition for habeas corpus in the Federal District Court (D. C. N. D. Calif.) asking *inter alia* for a stay of his shipment overseas pending disposition of his claim before the Army Board. The District Court denied relief and petitioner appealed to the Court of Appeals.

On April 7, 1969, petitioner asked me as Circuit Justice to stay his shipment overseas, pending disposition of his appeal by the Court of Appeals. The application reached me at 7:30 p. m., April 7. The shipment of petitioner overseas was scheduled for April 8, 1969, at 10 a. m. (E. S. T.). So I issued the stay about 8:15 p. m., April 7. My stay ran through April 18, and was issued so that the Conference could pass on the questions which seemed to me to be substantial.

Federal courts do not intervene on the merits pending exhaustion of military administrative remedies. *Gusik* v. *Schilder,* 340 U. S. 128. But the question is whether the federal courts have any oversight over members of the Armed Forces when they are seeking to exhaust their military administrative remedies. Moreover, when military administrative remedies are exhausted, can a federal court maintain the *status quo* while it determines the merits? That is to say, can a federal court "in aid of" its jurisdiction, 28 U. S. C. § 1651, keep a member of the Armed Services from being spirited out of the country? Some lower courts have granted interim relief pending exhaustion of military administrative remedies. *Schwartz* v. *Covington,* 341 F. 2d 537. Cf. *Nelson* v. *Miller,* 373 F. 2d 474.

Army Regulation 15–185, § III, par. 9 (Jan. 8, 1962), provides: "The application to the Board for correction of a record will not operate as a stay of any proceedings being taken with respect to the person involved." While that gives the Army a directive, it is of no significance in resolving the "in aid of" question under 28 U. S. C. § 1651.

This question is, in my mind, so substantial that it warrants issuance of the stay.

No. 1115. HENDERSON, WARDEN *v.* PRYOR. C. A. 6th Cir. Motion to dispense with printing petition denied and the Clerk is directed to proceed under Rule 39 (4) of the Rules of this Court. MR. JUSTICE BLACK dissents.

No. 1574, Misc. LUPINO *v.* YOUNG, WARDEN;
No. 1669, Misc. MADISON *v.* WASHINGTON ET AL.; and
No. 1723, Misc. STONE *v.* TRUJILLO, SHERIFF, ET AL.
Motions for leave to file petitions for writs of habeas corpus denied.

No. 1113. TELEPHONE USERS ASSOCIATION, INC. *v.* PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Motion to dispense with printing petition denied and the Clerk is directed to proceed under Rule 39 (4) of the Rules of this Court. *Arthur S. Curtis* on the motion.

No. 1184, Misc. TYLER ET UX. *v.* INGRAHAM, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied. *Edward A. Cazares* for respondents in opposition.

No. 1585, Misc. SMITH *v.* SUPREME COURT OF ILLINOIS. Motion for leave to file petition for writ of mandamus denied.

No. 776. UTAH PUBLIC SERVICE COMMISSION *v.* EL PASO NATURAL GAS CO. ET AL. Appeal from D. C. Utah. The motion of appellant to dismiss the appeal under Rule 60 and the motion of William M. Bennett for a hearing are set for oral argument on April 29, 1969. The Solicitor General is invited to file a brief and present oral argument if he so desires. MR. JUSTICE HARLAN and MR. JUSTICE STEWART dissent, believing that the action taken by the Court abuses its own processes. See Rule 60. MR. JUSTICE WHITE, MR. JUSTICE FORTAS, and MR. JUSTICE MARSHALL took no part in the consideration or decision of this matter. *David L. Berman,* Special Assistant to the Attorney General of Utah, on the motion to dismiss. *William M. Bennett, pro se,* on the motion for hearing.

No. 1504, Misc. BURHOE *v.* JULIAN, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied. *David Berman* on the motion. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Alan S. Rosenthal,* and *J. F. Bishop* in opposition.

Probable Jurisdiction Noted.

No. 634. WHEELER ET AL. *v.* MONTGOMERY, DIRECTOR, DEPARTMENT OF SOCIAL WELFARE OF CALIFORNIA, ET AL. Appeal from D. C. N. D. Cal. Probable jurisdiction noted. The Solicitor General is invited to file a brief expressing the views of the United States. *Charles*

Stephen Ralston for appellants. *Thomas C. Lynch,* Attorney General of California, *Richard L. Mayers* and *Elizabeth Palmer,* Deputy Attorneys General, and *Thomas M. O'Connor* for appellees. *Martin Garbus* for Roger Baldwin Foundation of the American Civil Liberties Union et al. as *amici curiae* in support of the petition. Reported below: 296 F. Supp. 138.

No. 675. UNITED STATES *v.* KNOX. Appeal from D. C. W. D. Tex. Probable jurisdiction noted and case set for oral argument immediately following No. 934 [certiorari granted, 393 U. S. 1079]. *Solicitor General Griswold,* former *Assistant Attorney General Vinson, Assistant Attorney General Wilson, Beatrice Rosenberg, Jerome M. Feit,* and *Charles Ruff* for the United States. *J. Edwin Smith* for appellee.

No. 1120. GOLDBERG, COMMISSIONER OF SOCIAL SERVICES OF THE CITY OF NEW YORK *v.* KELLY ET AL. Appeal from D. C. S. D. N. Y. Probable jurisdiction noted and case set for oral argument immediately following No. 634, *ante,* p. 970. The Solicitor General is invited to file a brief expressing the views of the United States. *J. Lee Rankin, Stanley Buchsbaum,* and *John J. Loflin* for appellant. *Martin Garbus* for appellees. Reported below: 294 F. Supp. 893.

Certiorari Granted. (See also No. 1040, *ante,* p. 700; No. 807, Misc., *ante,* p. 720; and No. 1107, Misc., *ante,* p. 705.)

No. 1133. MILLS ET AL. *v.* ELECTRIC AUTOLITE CO. ET AL. C. A. 7th Cir. Certiorari granted. The Solicitor General is invited to file a brief expressing the views of the United States. *Arnold I. Shure, Robert A. Sprecher,* and *Mozart G. Ratner* for petitioners. *Albert E. Jenner, Jr.,* and *Jerold S. Solovy* for respondents. Reported below: 403 F. 2d 429.

No. 976. CHOCTAW NATION ET AL. *v.* OKLAHOMA ET AL.; and

No. 1104. CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari granted. Cases consolidated and a total of two hours allotted for oral argument. *J. D. McLaughlin* for petitioners in No. 976, and *Peyton Ford, Earl Boyd Pierce,* and *Paul M. Niebell* for petitioner in No. 1104. *G. T. Blankenship,* Attorney General, for respondent State of Oklahoma, *N. A. Gibson* for respondents Commissioners of the Land Office of Oklahoma, *James H. Ross* for respondent Eason Oil Co., *Robert W. Richards* for respondent Mobil Oil Corp., *David O. Cordell, Riley B. Fell,* and *Oscar L. Hasty* for respondent Marathon Oil Co., and *S. W. Wells* for respondent Skelly Oil Co., in both cases. *Solicitor General Griswold, Acting Assistant Attorney General Taylor, Louis F. Claiborne,* and *Roger P. Marquis* for the United States as *amicus curiae* in support of the petitions in both cases. Reported below: 402 F. 2d 739.

No. 668, Misc. MORALES *v.* NEW YORK. Ct. App. N. Y. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Henry B. Rothblatt* for petitioner. *Burton B. Roberts* and *Daniel J. Sullivan* for respondent. Reported below: 22 N. Y. 2d 55, 753; 238 N. E. 2d 307, 239 N. E. 2d 221.

Certiorari Denied. (See also No. 582, *ante,* p. 714; No. 834, *ante,* p. 715; No. 1092, *ante,* p. 713; and No. 1125, *ante,* p. 713.)

No. 1094. BORCHERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Robert A. Neeb, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 405 F. 2d 735.

No. 902. Irwin *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. *J. Edwin Smith* and *Clayton Malone* for petitioner. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Hawthorne Phillips,* Executive Assistant Attorney General, *Robert C. Flowers, Allo B. Crow, Jr.,* and *Gilbert J. Pena,* Assistant Attorneys General, and *W. V. Geppert* for respondent.

No. 996. Burhoe *v.* Julian, U. S. District Judge, et al. C. A. 1st Cir. Certiorari denied. *David Berman* for petitioner. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Alan S. Rosenthal,* and *J. F. Bishop* for Julian, and *Howard M. Miller,* Assistant Attorney General of Massachusetts, for Byrne, respondents.

No. 1032. Continental Illinois National Bank & Trust Co. of Chicago *v.* United States. Ct. Cl. Certiorari denied. *James A. Velde* and *John F. Beggan* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph Kovner,* and *Elmer J. Kelsey* for the United States. Reported below: 185 Ct. Cl. 642, 403 F. 2d 721.

No. 1037. Russell *v.* Mutual of Omaha Insurance Co. C. A. 10th Cir. Certiorari denied. *Donald C. Little* for petitioner. *Roy P. Swanson* for respondent. Reported below: 402 F. 2d 339.

No. 1085. Zudick et al. *v.* United States et al. C. A. 3d Cir. Certiorari denied. *Herbert L. Zuckerman* for petitioners. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John P. Burke* for the United States et al. Reported below: 405 F. 2d 926 and 929.

No. 1090. McMenama *v.* United States. C. A. 6th Cir. Certiorari denied. *William H. Beck* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Kirby W. Patterson* for the United States. Reported below: 403 F. 2d 969.

No. 1098. Potomac Cooperators, Inc., et al. *v.* American Security & Trust Co., Trustee in Reorganization. C. A. D. C. Cir. Certiorari denied. *John M. Bray* and *Burton A. Schwalb* for petitioners. *Alexander B. Hawes* and *Samuel M. Greenbaum* for respondent.

No. 1100. International Woodworkers of America, AFL-CIO, et al. *v.* Masonite Corp. Sup. Ct. Miss. Certiorari denied. *James E. Youngdahl* for petitioners. *Hulse Hays, Jr.,* and *Frank H. Stewart* for respondent. Reported below: 215 So. 2d 691.

No. 1105. Berk, dba Berk Trade School *v.* United States. Ct. Cl. Certiorari denied. *Moe D. Karash* for petitioner. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Alan S. Rosenthal* for the United States.

No. 1108. Chertkof *v.* Harry C. Weiskittel Co., Inc. Ct. App. Md. Certiorari denied. *Benjamin Lipsitz* for petitioner. *Joseph Sherbow, Edward F. Shea, Jr.,* and *Robert W. Kernan* for respondent. Reported below: 251 Md. 544, 248 A. 2d 373.

No. 1117. Barrows et al. *v.* United States. C. A. 9th Cir. Certiorari denied. *Allen B. Gresham* for petitioners. *Solicitor General Griswold, Acting Assistant Attorney General Taylor, Roger P. Marquis,* and *Robert S. Lynch* for the United States. Reported below: 404 F. 2d 749.

No. 1107. WILSON *v.* MARYLAND. Ct. App. Md. Certiorari denied. *Martin H. Freeman* for petitioner.

No. 1119. UNITED STATES FOR THE USE AND BENEFIT OF TRANE CO. *v.* GELMAN, DBA GELCO BUILDERS ET AL. C. A. 2d Cir. Certiorari denied. *Herman N. Schwartz* for petitioner. *Jack Hart* for respondents. Reported below: 406 F. 2d 280.

No. 1122. FUND OF FUNDS, LTD. *v.* ROTH. C. A. 2d Cir. Certiorari denied. *Allan F. Conwill* for petitioner. *Philip B. Kurland* for respondent. Reported below: 405 F. 2d 421.

No. 1136. GLENS FALLS INSURANCE CO. *v.* NATIONWIDE MUTUAL INSURANCE CO. ET AL. Sup. Ct. Mont. Certiorari denied. *Joseph F. Meglen* for petitioner. *Cale Crowley* for Nationwide Mutual Insurance Co., and *Charles C. Collins* for State Farm Mutual Automobile Insurance Co., respondents. Reported below: — Mont. —, 451 P. 2d 515.

No. 1137. HABER *v.* GREASON. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. *Sam Haber,* petitioner, *pro se. Edward Margolin* for respondent. Reported below: 27 App. Div. 2d 576, 276 N. Y. S. 2d 353.

No. 887. 3259 M STREET, INC. *v.* CITIZENS ASSOCIATION OF GEORGETOWN. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Frank H. Strickler* for petitioner. *E. Barrett Prettyman, Jr.,* and *Robert C. Maynard* for respondent. Reported below: 131 U. S. App. D. C. 152, 403 F. 2d 175.

No. 1139. Gulf Stevedore Corp. et al. *v.* Watson et al. C. A. 5th Cir. Certiorari denied. *Carl O. Bue, Jr.,* for petitioners. *W. Jiles Roberts* for Watson, and *Solicitor General Griswold* for Shea, respondents. Reported below: 400 F. 2d 649.

No. 1151. Broadview Chemical Corp. *v.* Loctite Corp. C. A. 2d Cir. Certiorari denied. *Granger Cook, Jr.,* and *James P. Hume* for petitioner. *Walter D. Ames* for respondent. Reported below: 406 F. 2d 538.

No. 897. Coates *v.* Securities and Exchange Commission; and

No. 937. Kline *v.* Securities and Exchange Commission. C. A. 2d Cir. Certiorari denied. *Albert R. Connelly, Gordon Gooch,* and *Donald Strauber* for petitioner in No. 897, and *Orison S. Marden* for petitioner in No. 937. *Solicitor General Griswold, Philip A. Loomis, Jr., David Ferber,* and *Donald M. Feuerstein* for respondent in both cases. Reported below: 401 F. 2d 833.

Mr. Justice White, dissenting.

I would grant certiorari in No. 937 and set the case for oral argument. The issues are of general importance, and the judgment of the Court of Appeals ordering cancellation of petitioner's stock option has sufficient finality to warrant review now rather than after further proceedings in the District Court.

No. 1009. Daniels, aka Jones *v.* Michigan. Ct. App. Mich. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Wendell A. Miles* for petitioner. *Frank J. Kelley,* Attorney General of Michigan, and *Robert A. Derengoski,* Solicitor General, for respondent. Reported below: 12 Mich. App. 369, 163 N. W. 2d 22.

No. 1061. TEAGUE ET AL. *v.* REGIONAL COMMISSIONER OF CUSTOMS, REGION II, ET AL. C. A. 2d Cir. Certiorari denied. *Henry Winestine, Osmond K. Fraenkel, Melvin L. Wulf,* and *Alan H. Levine* for petitioners. *Solicitor General Griswold* for respondents. Reported below: 404 F. 2d 441.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

This case presents a highly important question under the First Amendment, namely, whether, as the court below held, American citizens can be required to apply to the Treasury Department's Office of Foreign Assets Control for a license in order to receive magazines, films, or other publications sent to them from mainland China, North Korea, or North Vietnam. The decision of the Court of Appeals may well be inconsistent with *Lamont* v. *Postmaster General,* 381 U. S. 301 (1965), in which we recently invalidated a somewhat similar regulation of the Post Office Department. Nevertheless, the Court denies certiorari here. It seems plain that the sole explanation for the Court's action is the fact that the petition for certiorari, having been delayed by an unusually severe snowstorm, arrived here two days after the 90-day period allowed for seeking certiorari, 28 U. S. C. § 2101 (c), would normally expire. Because I think the important First Amendment issue in this case demands consideration by this Court, and because I cannot accept the Court's interpretation of § 2101 (c), which penalizes petitioners for a snowstorm, an act of God, I must dissent.

I.

Petitioners are addressees of mail packages containing publications originating in China and North Vietnam. When these packages reached the United States they were detained by the Commissioner of Customs pursuant to the Foreign Assets Control Regulations, 31 CFR § 500.808. The Commissioner then sent notices to petitioners, advising them that this mail would be released only if licenses were obtained from the Office of Foreign Assets Control. Petitioners did not apply for licenses but instead brought this suit, claiming that the regulations were unconstitutional. Their primary claim was and is that the regulations, by authorizing customs officials to refuse delivery under some circumstances and by requiring in all cases that the addressees submit to the cumbersome and time-consuming licensing process, abridged their First Amendment rights to receive published material.

The decision below, upholding these regulations, seems difficult to reconcile with our recent decision in *Lamont, supra.* In that case we held unconstitutional a Post Office regulation that required addressees of "communist political propaganda" to notify the Post Office explicitly of their desire to receive such publications in order to obtain delivery. We stated that the fatal flaw of the scheme was that "it requires an official act (*viz.*, returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights." 381 U. S., at 305. In the present case the burden imposed on addressees is, if anything, far greater than that involved in *Lamont.* The addressee is not merely required to fill out and return a reply card, after which the magazine will automatically be sent. In the present case something quite different is required. The addressee must fill out a detailed license application and file it in duplicate.[1] He has no assurance that his application, once filed, will be granted, and in fact the regulations provide only general guidance as to the factors that will be considered in determining whether to grant a license.[2] Processing of the application normally requires about 10 days, according to the Government, but this period, which is itself not inconsiderable, may in fact represent only the minimum delay.[3]

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[1] 31 CFR § 500.801 (b) (2).

Only one justification is suggested for the very severe prior restraint on First Amendment rights that results from this licensing scheme. The Court of Appeals said that the regulations are permissible as a means of restricting the flow of American currency to designated foreign countries determined to be hostile to the United States. Petitioners, on the other hand, argue broadly that they have a right under the First Amendment to purchase publications from any source of their choosing, even a country with which we might be at war. It may not, however, even be necessary to reach this important question because there is considerable doubt whether the regulations relating to publications can be considered necessary for preventing the outflow of American currency. Other regulations promulgated under the President's emergency power to control transactions in foreign exchange, 40 Stat. 415, as amended, 50 U. S. C. App. § 5 (b), broadly prohibit the making of any payments directly or indirectly to the designated foreign countries or their nationals by any person or corporation subject to the jurisdiction of the United States, regardless of how such payments are effectuated and regardless of whether the banks or other institutions serving as intermediaries are located in third countries. 31 CFR § 500.201. Violation of these regulations is a felony punishable by heavy penalties. 50 U. S. C. App. § 5 (b)(3). Although the licensing provisions related to publications may make it more difficult to evade this direct prohibition against foreign exchange transactions with the designated countries, such incidental benefits in the enforcement of even a permissible governmental policy ordinarily do not justify infringement on First Amendment rights. Cf. *Smith* v. *California,* 361 U. S. 147 (1959). In addition, the regulations explicitly permit the purchase of publications from these countries "without restrictions as to method of payment" in the case of universities, libraries, research, and scientific institutions acting under programs approved by the Librarian of Congress or the National Science Foundation. 31 CFR § 500.204 App. (108). The additional demand for these publications by private parties may be insignificant compared to the volume of transactions the Government has chosen to permit in the case of "approved" institutions. In fact, the remaining potential dollar outflow, and especially the part of it that would not be checked by the general prohibitions relating to foreign exchange transactions, may be so insubstantial that the only significant effect of the regulations would be to choke off the flow of these publications to readers who would not actually pay for them but who may not take the trouble to fill out the required forms or who may not be able to establish, to the satisfaction of the Government's licensing officials, that the publications involved were in fact gifts. Under these circumstances, the regulations involved here surely raise a serious First Amendment question that should be heard and decided by this Court.

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[2] 31 CFR § 500.204 App. (108) (1969) provides as follows:

"*Publications and films from China, North Korea and North Viet Nam.* Publications and films originating in mainland China, North Korea or North Viet Nam are licensed for commercial importation provided all payments due to the suppliers are made into blocked accounts. Publications and films originating in mainland China, North Korea, and North Viet Nam are also licensed without restrictions as to method of payment under programs approved by the Librarian of Congress or the National Science Foundation for universities, libraries, research and scientific institutions. Such publications and films are also licensed in exchange for publications from the United States. Additionally, such publications and films are licensed when the Office of Foreign Assets Control is satisfied that they are bona fide gifts to the importers and that there is not and has not been since the effective date any direct or indirect financial or commercial benefit to designated countries or nationals thereof from the importations."

[3] After the commencement of this suit, petitioner Pollin applied for a license and after waiting four weeks received only a request for additional information; the license was finally granted after a total delay of eight weeks. Similarly, petitioner Teague waited five weeks after submitting a license application, only to receive a request that he answer an additional number of detailed questions; he did not pursue the matter further.

II.

The only apparent explanation for the Court's denial of certiorari in this case is the fact that the petition arrived here two days after the 90-day period allowed by 28 U. S. C. § 2101 (c) for seeking certiorari in a civil case would normally have expired. The circumstances under which this occurred are these. The judgments sought to be reviewed were entered on November 14, 1968, and the 90-day period therefore expired on Wednesday, February 12, 1969. The petition for certiorari, along with the required number of copies, was sent from New York City by first-class mail at about noon on Monday, February 10. A severe snowstorm had hit New York City the night before, causing considerable disruption of many services including, as it turned out, the mails. Counsel for petitioners no doubt anticipated that some delay might possibly result from the storm, but since first-class mail from New York normally reaches Washington overnight, they could not have anticipated that it would take more than the remaining two and one-half days for their petition to arrive. In fact, however, the petition took four days to reach Washington and was docketed here on Friday, February 14, 1969.

The statute governing the time for seeking certiorari in a civil case, 28 U. S. C. § 2101 (c), provides that a petition for review of any judgment or decree "shall be taken or applied for within ninety days after the entry of such judgment or decree." It is suggested by the Solicitor General, on behalf of respondents here, that this statute is "jurisdictional," and that we must follow it. I agree, of course, that we should follow the statute. But we must first determine what the statute means. Commentators and this Court alike have often said that the statute is "jurisdictional," and no doubt this statement is true in certain senses of that term. But the statement certainly is not true if it is intended to suggest that the statute deprives this Court of all power to hear cases filed after the 90-day period, regardless of whether the delay was caused by snowstorms making the transportation of the mails impossible. Under no known principle of statutory construction can such an interpretation of § 2101 (c) be supported. Nor have I been able to find any case interpreting the statute in this way. Although many cases repeat the "jurisdictional" formula, none of them that I have found involved situations where the delay was wholly caused by circumstances entirely beyond the petitioner's control. In fact, many of the early cases interpreting Rev. Stat. §§ 997 and 1008, the predecessors of § 2101 (c), made clear that this Court had power to waive the time requirement of these provisions under appropriate circumstances.[4] In recent years this Court has on occasion granted certiorari and decided on the merits civil cases that had been filed after the 90-day period, without making any mention of the time question. See, *e. g., Ray* v. *Pierson,* 386 U. S. 547 (1967) (No. 94, October Term, 1966).

In addition, we have squarely adopted this approach in interpreting several related statutes. The provision governing direct appeals to this Court from a district court, now § 2101 (a), provides that "[t]he record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court." The Court held, under circumstances much less compelling than those present here, that this provision did not eliminate our power to hear appeals docketed after the 60-day period, noting that "[i]t will not expedite determination of constitutional questions to dismiss appeals because of errors of practice." *United Public Workers* v. *Mitchell,* 330 U. S. 75, 86 (1947). The cases deciding the timeliness of an appeal to the court of appeals have reached the same result under statutes that were even more clearly phrased in mandatory terms, and did not explicitly include even an indirect reference to a judicial rule-making power on the subject. *E. g., Georgia Lumber Co.* v. *Compania,* 323 U. S. 334 (1945); *R. F. C.* v. *Prudence Group,* 311 U. S. 579 (1941).

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[4] See, *e. g., Grigsby* v. *Purcell,* 99 U. S. 505, 506–507 (1879); *Richardson* v. *Green,* 130 U. S. 104, 111 (1889); *Green* v. *Elbert,* 137 U. S. 615, 621–623 (1891).

As all these cases show, the Court's Draconian interpretation of the statute is not supported by our prior decisions. Nor does the language of the statute itself dictate the Court's result. The statute does not say explicitly that the time limitation may be inapplicable under certain extenuating circumstances, but it also does not say that the time limit must be ruthlessly applied in every conceivable situation, without regard to hardships involved or extenuating circumstances present. The Court therefore must decide what is the more sensible interpretation of the statute. I for one cannot think of any purpose Congress might have had that could possibly be served by holding that a litigant can be defeated solely because of a delay that was entirely beyond his control. As we stressed in the *R. F. C.* case, *supra:*

> "If that were true, the existence of the right to appeal would be subject to contingencies which no

> degree of diligence by an appellant could control. Ambiguities in statutory language should not be resolved so as to imperil a substantial right which has been granted." 311 U. S., at 582.

It might be well to imagine for a moment what would have happened if some Senator or Representative had suggested an amendment to "clarify" the proposed § 2101 (c) by stating that a petition filed after the 90-day period will not be out of time "when the delay is caused solely by an interruption of the mail service due to snowstorms." It is conceivable that more than a few members of Congress would consider such an amendment an insult to this Court's intelligence and would feel it unnecessary to lead this Court by the hand on such matters of elementary common sense. It is impossible, however, to believe that any of them would have regarded an amendment to the opposite effect as properly reflecting the purpose of the statute, and yet this opposite amendment, ruling a petition out of time under these circumstances, is precisely the amendment that the Court today tacitly engrafts onto § 2101 (c).

I would not adopt any such pointlessly harsh interpretation of the statute, one that furthers no congressional objective whatsoever and denies litigants their opportunity to seek review in this Court on the basis of atmospheric events wholly beyond their control. This is a return to all the cruel technicalities of common-law pleading, and then some. I would grant certiorari and hear argument on the vital First Amendment issues at stake in this case.

Mr. Justice Harlan would also grant certiorari, but would postpone the question of jurisdiction to consideration of the case on the merits.

No. 1070. Balistrieri *v.* United States. C. A. 7th Cir. Certiorari denied. Mr. Justice Marshall took no part in the consideration or decision of this petition. *Edward Bennett Williams, Harold Ungar,* and *Maurice Walsh* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *Charles A. McNelis* for the United States. Reported below: 403 F. 2d 472.

Mr. Justice Fortas, with whom Mr. Justice Douglas joins, dissenting.

Petitioner was adjudged guilty of income tax evasion. Petitioner claims and the Government does not deny the following astounding record of lawless invasion of his rights by government agents:

1. An electronic "bug," installed by trespass, was maintained in his office for over a year.
2. A "bug" was unlawfully installed and maintained for almost six months in the office of petitioner's counsel.
3. A "bug" was installed by trespass and maintained in the office-apartment of petitioner's secretary for some eight months.
4. FBI agents broke into the apartment of petitioner's secretary and photographed papers in a private file belonging to petitioner.
5. IRS agents searched the secretary's apartment and seized records of petitioner pursuant to a warrant later held invalid. *Alioto* v. *United States,* 216 F. Supp. 48 (D. C. E. D. Wis. 1963).

FBI and IRS agents also kept the secretary's office-apartment under observation through a peephole in the door of a room across the hall and, at the request of IRS officials, the Post Office maintained a mail cover of the petitioner, recording the addressee and sender of all mail delivered to certain addresses believed to be connected with petitioner.

Much evidence was suppressed by the District Court as the product of the unlawful activities of the federal agents, and one count of the indictment was dismissed. However, the District Court held that the Government had adequately shown that on two other counts its case rested on independently obtained evidence, free of the taint of the illegal searches. The Seventh Circuit affirmed. 403 F. 2d 472. This Court now refuses to review the case.

I do not agree. This is not merely a factual problem which must be regarded by this Court as finally disposed of by the findings below. It presents a fundamental question of law: The Government contends and the courts below found that the federal agents obtained incriminating evidence relating to unreported income from a scrap metal company as a result of assertedly non-tainted leads gleaned from the mail cover. It is true that the agent who decided to examine the company's records knew that 14 months earlier the mail cover had turned up a letter addressed to the company at one of petitioner's addresses. But the agent also admittedly had access to the inventory of illegally seized documents. That inventory included documents explicitly showing many transactions by the company in which petitioner might have been involved. The agent therefore had access to a great mass of illegally obtained information unmistakably suggesting a line of further inquiry, as well as to the isolated fact that a letter—of unknown contents—to the scrap metal company had been delivered many months before to an address associated with petitioner.

Whether in these circumstances the IRS agent's decision to examine the scrap metal company's records was "gained from an independent source" (*Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392 (1920)) and was not an "exploitation of . . . illegality" (*Wong Sun*

v. *United States,* 371 U. S. 471, 488 (1963)) raises basic questions of the burden of proof and the standard to be applied in determining whether and to what extent widespread lawlessness in an investigation should deny the prosecution use of evidentiary material. I would grant certiorari to examine these important questions.

No. 1093. Best Medium Publishing Co., Inc. *v.* Varnish. C. A. 2d Cir. Certiorari denied. Mr. Justice Black is of the opinion that certiorari should be granted. *Irwin M. Taylor* for petitioner. *Ernest Allen Cohen* for respondent. Reported below: 405 F. 2d 608.

No. 1095. Acuff et al. *v.* United Papermakers & Paperworkers, AFL–CIO, et al. C. A. 5th Cir. Certiorari denied. Mr. Justice Black is of the opinion that certiorari should be granted. *Reber Boult, Jr., Charles Morgan, Jr., Melvin L. Wulf,* and *Eleanor Holmes Norton* for petitioners. *Warren Woods, Betty Southard Murphy, Benjamin Wyle,* and *Willis C. Darby, Jr.,* for United Papermakers & Paperworkers, AFL–CIO, et al., and *T. K. Jackson, Jr.,* for Scott Paper Co., Southern Division, respondents. Reported below: 404 F. 2d 169.

No. 1116. Bufalino *v.* Michigan Bell Telephone Co. et al. C. A. 6th Cir. Certiorari denied. Mr. Justice Marshall took no part in the consideration or decision of this petition. *William E. Bufalino,* petitioner, *pro se. Leslie W. Fleming* for respondents Michigan Bell Telephone Co. et al., and *John F. Hathaway* for respondents Bullock et al. Reported below: 404 F. 2d 1023.

No. 627, Misc. LeMaster *v.* Texas et al. Ct. Crim. App. Tex. Certiorari denied. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, and *Robert C. Flowers* and *Lonny F. Zwiener,* Assistant Attorneys General, for respondents.

No. 1112. LEIGHTON *v.* ONE WILLIAM STREET FUND, INC., ET AL. C. A. 2d Cir. Motion of petitioner to require certification of additional portions of appendix granted. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition. *Arthur W. Murphy* for respondent One William Street Fund, Inc., *Benjamin C. Milner III* and *Anthony L. Fletcher* for respondents Lehman Brothers et al., and *Harvey D. Myerson* for respondent Reed. Reported below: 404 F. 2d 351.

No. 1129. MOTORISTS MUTUAL INSURANCE CO. *v.* SIMPSON, ADMINISTRATRIX. C. A. 7th Cir. Motion to dispense with printing respondent's brief granted. Certiorari denied. MR. JUSTICE FORTAS is of the opinion that certiorari should be granted. *Martin J. Flynn* for petitioner. *Alex M. Clark* for respondent. Reported below: 404 F. 2d 511.

No. 1135. KAUFMAN *v.* NEW YORK CENTRAL RAILROAD CO., NOW KNOWN AS PENN CENTRAL CO. Sup. Ct. Ohio. Motion to change title of respondent from New York Central Railroad Co. to New York Central Railroad Co., now known as Penn Central Co., granted. Certiorari denied. *Charles H. Brady* for petitioner. *George J. Gould* and *Richard F. Ellenberger* for respondent.

No. 943, Misc. HAYES *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. *Robert W. Warren,* Attorney General of Wisconsin, and *William A. Platz, Betty R. Brown,* and *William F. Eich,* Assistant Attorneys General, for respondent. Reported below: 39 Wis. 2d 125, 158 N. W. 2d 545.

No. 973, Misc. WIDEMAN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. *James D. Crawford* and *Arlen Specter* for respondent.

No. 964, Misc. EDWARDS *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. *Kent Frizzell,* Attorney General of Kansas, and *Edward G. Collister, Jr.,* Assistant Attorney General, for respondent.

No. 1119, Misc. LAWHON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Charles W. Tessmer* for petitioner. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, and *Robert C. Flowers* and *Lonny F. Zwiener,* Assistant Attorneys General, for respondent. Reported below: 429 S. W. 2d 147.

No. 1179, Misc. MAESTAS *v.* UTAH. Sup. Ct. Utah. Certiorari denied. *Vernon B. Romney,* Attorney General of Utah, and *Lauren N. Beasley,* Assistant Attorney General, for respondent. Reported below: 21 Utah 2d 367, 445 P. 2d 983.

No. 1302, Misc. RAMER *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. *Robert W. Warren,* Attorney General of Wisconsin, and *William A. Platz, Betty R. Brown,* and *William F. Eich,* Assistant Attorneys General, for respondent. Reported below: 40 Wis. 2d 79, 161 N. W. 2d 209.

No. 1352, Misc. CAPALDO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Jerome M. Feit* for the United States. Reported below: 402 F. 2d 821.

No. 1361, Misc. MEYER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 404 F. 2d 254.

No. 1427, Misc. SILVER *v.* DICKSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 403 F. 2d 642.

No. 1438, Misc. BLACK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *William F. Walsh* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Leonard H. Dickstein* for the United States. Reported below: 405 F. 2d 187.

No. 1442, Misc. MOWER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *J. B. Stoner* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 402 F. 2d 982.

No. 1449, Misc. REESE *v.* MEIER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for respondents.

No. 1482, Misc. HARRISON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States.

No. 1461, Misc. CAMAK *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *James J. Wood,* Assistant Attorney General, for respondent.

No. 1462, Misc. CRACHY *v.* KROPP, WARDEN. C. A. 6th Cir. Certiorari denied. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *James J. Wood,* Assistant Attorney General, for respondent.

No. 1450, Misc. Horton *v.* New York. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 30 App. Div. 2d 709, 290 N. Y. S. 2d 767.

No. 1477, Misc. Carter *v.* Virginia. Sup. Ct. App. Va. Certiorari denied. Reported below: 209 Va. 317, 163 S. E. 2d 589.

No. 1492, Misc. Williams *v.* Peyton, Penitentiary Superintendent. C. A. 4th Cir. Certiorari denied.

No. 1500, Misc. Jones *v.* United States. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 400 F. 2d 892.

No. 1501, Misc. Silva *v.* Field, Men's Colony Superintendent, et al. Sup. Ct. Cal. Certiorari denied.

No. 1531, Misc. DeLorme et al. *v.* United States. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Jerome M. Feit* for the United States.

No. 1539, Misc. Rodriguez *v.* California. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 1541, Misc. Geeter *v.* United States. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Jerome M. Feit* for the United States. Reported below: 401 F. 2d 176.

No. 1556, Misc. Scott *v.* United States. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 405 F. 2d 495.

No. 1545, Misc. McKinney *v.* Boyle et al. C. A. 9th Cir. Certiorari denied. *Harold R. Scoville* for respondents. Reported below: 404 F. 2d 632.

No. 1550, Misc. Dowling *v.* Illinois. Sup. Ct. Ill. Certiorari denied.

No. 1566, Misc. Williams *v.* United States. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 404 F. 2d 1372.

No. 1581, Misc. Fields *v.* Mancusi, Warden. C. A. 2d Cir. Certiorari denied.

No. 1583, Misc. Hansen *v.* Utah. Sup. Ct. Utah. Certiorari denied. Reported below: 22 Utah 2d 63, 448 P. 2d 720.

No. 1592, Misc. Sumlin *v.* Illinois. Sup. Ct. Ill. Certiorari denied. *Gerald W. Getty* and *James J. Doherty* for petitioner. Reported below: 41 Ill. 2d 390, 243 N. E. 2d 825.

No. 1598, Misc. Carr *v.* Craven, Warden. C. A. 9th Cir. Certiorari denied.

No. 1601, Misc. Harrell *v.* Wisconsin. Sup. Ct. Wis. Certiorari denied. Reported below: 40 Wis. 2d 536, 162 N. W. 2d 590.

No. 1602, Misc. Broussard *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1641, Misc. Brown *v.* Peyton, Penitentiary Superintendent. C. A. 4th Cir. Certiorari denied.

No. 1629, Misc. JONES *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 3 Md. App. 608, 240 A. 2d 347.

No. 1640, Misc. OLENIN *v.* CURTIN & JOHNSON, INC., ET AL. C. A. D. C. Cir. Certiorari denied. *Arthur S. Curtis* for petitioner. *Denver H. Graham* and *Albert E. Brault* for respondents. Reported below: — U. S. App. D. C. —, — F. 2d —.

No. 1649, Misc. BROTZE *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 433 S. W. 2d 340.

No. 732, Misc. RICH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. THE CHIEF JUSTICE is of the opinion that certiorari should be granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Marshall T. Golding* for the United States.

No. 751, Misc. McKNIGHT *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE WHITE are of the opinion that certiorari should be granted and judgment reversed. *Gerald W. Getty* for petitioner. *William J. Scott,* Attorney General of Illinois, and *John J. O'Toole,* Assistant Attorney General, for respondent. Reported below: 39 Ill. 2d 577, 237 N. E. 2d 488.

No. 1570, Misc. RUBIO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Terence F. MacCarthy* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 404 F. 2d 678.

Rehearing Denied.

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. (LOUISIANA BOUNDARY CASE), *ante,* p. 11. Petition for rehearing denied. THE CHIEF JUSTICE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 964. INTER NATIONAL BANK OF MIAMI *v.* BROCK, TRUSTEE, ET AL., 393 U. S. 1118; and

No. 987. ALAMEDA CONSERVATION ASSN. *v.* CITY OF ALAMEDA ET AL., *ante,* p. 906. Petitions for rehearing denied.

No. 317. DI PIETTO ET AL. *v.* UNITED STATES, *ante,* p. 310. Petition for rehearing on behalf of Di Pietto, Infelice, and Santucci denied.

No. 562. BENSON *v.* CARTER, PROBATION OFFICER, ET AL., 393 U. S. 1080; and

No. 595. HINGER *v.* CITY OF PIQUA, 393 U. S. 1001. Motions for leave to file petitions for rehearing denied.

No. 752. MILTON FRANK ALLEN PUBLICATIONS, INC. *v.* GEORGIA ASSOCIATION OF PETROLEUM RETAILERS, INC., 393 U. S. 1025, 1112. Motion for leave to file second petition for rehearing denied.

No. 792. BIRNBAUM *v.* UNITED STATES, *ante,* p. 922. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 1011. O'BRYAN *v.* CHANDLER, CHIEF JUDGE, U. S. DISTRICT COURT, *ante,* p. 906. Motion to dispense with printing petition granted. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition.

No. 656, Misc. **Reece v. United States et al.**, *ante*, p. 912;

No. 901, Misc. **Watson v. Schneckloth, Conservation Center Superintendent**, 393 U. S. 1114;

No. 1276, Misc. **Jennison v. United States**, *ante*, p. 912;

No. 1332, Misc. **McGurrin v. Shovlin, State Hospital Superintendent**, 393 U. S. 1075;

No. 1362, Misc. **Smith v. Laird, Secretary of Defense**, *ante*, p. 934; and

No. 1469, Misc. **Furtak v. Mancusi, Warden**, *ante*, p. 939. Petitions for rehearing denied.

No. 971, Misc. **Lynch v. Landy, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, et al.**, 393 U. S. 1070. Petition for rehearing and other relief denied.

April 28, 1969.

Miscellaneous Orders.

No. ——. **United Telephone Company of Florida v. Mayo et al.** Sup. Ct. Fla. Motion of appellant to dismiss appeal under Rule 14 (1) granted. *Charles Pickett* on the motion.

No. ——. **Mendez v. Craven, Warden, et al.** Motion for leave to file petition for writ of habeas corpus presented to Mr. Justice Douglas, and by him referred to the Court, denied.

No. 2000, Misc. **In re Disbarment of Sullivan.** It is ordered that Thomas W. Sullivan of Montgomery, Alabama, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 777. FIRST NATIONAL BANK IN PLANT CITY *v.* DICKINSON, COMPTROLLER OF FLORIDA, ET AL.; and

No. 932. CAMP, COMPTROLLER OF THE CURRENCY *v.* DICKINSON, COMPTROLLER OF FLORIDA, ET AL. C. A. 5th Cir. [Certiorari granted, 393 U. S. 1079.] Motion to enlarge time for oral argument granted and a total of one hour and 40 minutes allotted for oral argument. MR. JUSTICE FORTAS took no part in the consideration or decision of this motion. *Solicitor General Griswold* for Camp and *Robert S. Edwards* for First National Bank in Plant City on the motion.

No. 1718, Misc. RILEY *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL.;

No. 1720, Misc. SPANIEL *v.* NELSON, WARDEN, ET AL.;

No. 1725, Misc. JONES *v.* RUSSELL, WARDEN;

No. 1746, Misc. AKERS *v.* CASSIN, JUDGE; and

No. 1771, Misc. WHITE *v.* FIELD, MEN'S COLONY SUPERINTENDENT. Motions for leave to file petitions for writs of habeas corpus denied.

Probable Jurisdiction Noted.

No. 1146. GOLDSTEIN, AKA PIETRARU, ET AL. *v.* COX ET AL. Appeal from D. C. S. D. N. Y. Motion of Wolf Popper Ross Wolf & Jones for leave to file a brief as *amicus curiae* granted. Probable jurisdiction noted. *John R. Vintilla, Emanuel Eschwege,* and *Novak N. Marku* for appellants. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Daniel M. Cohen,* Assistant Attorney General, for appellees. *Martin Popper* on the motion. Reported below: 299 F. Supp. 1389.

Certiorari Granted.

No. 1124. UNITED STATES *v.* W. M. WEBB, INC., ET AL. C. A. 5th Cir. Certiorari granted. *Solicitor General*

Griswold, Assistant Attorney General Walters, Harris Weinstein, Louis M. Kauder, and *Robert I. Waxman* for the United States. *Joseph J. Lyman* for respondents. Reported below: 402 F. 2d 956.

No. 1144. BREEN *v.* SELECTIVE SERVICE LOCAL BOARD No. 16, BRIDGEPORT, CONNECTICUT, ET AL. C. A. 2d Cir. Certiorari granted. *Emanuel Margolis, Lawrence P. Weisman,* and *Melvin L. Wulf* for petitioner. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Morton Hollander,* and *Ralph A. Fine* for respondents. Reported below: 406 F. 2d 636.

No. 1176. GUTKNECHT *v.* UNITED STATES. C. A. 8th Cir. Certiorari granted and case set for oral argument immediately following No. 1144, *supra. Melvin L. Wulf* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 406 F. 2d 494.

Certiorari Denied. (See also No. 1168, *ante,* p. 813.)

No. 1127. TECHNITROL, INC. *v.* McMANUS, U. S. DISTRICT JUDGE. C. A. 8th Cir. Certiorari denied. *Laurence B. Dodds* for petitioner. *Morris Relson* for Collins Radio Co., defendant below, in opposition. Reported below: 405 F. 2d 84.

No. 1134. WILLIAMS ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Phillip L. Charles* for petitioners. *Solicitor General Griswold* and *Assistant Attorney General Walters* for respondent.

No. 1153. CIAFFONI ET AL. *v.* BRUNSWICK CORP. ET AL. Sup. Ct. Pa. Certiorari denied. *Milton D. Rosenberg* for petitioners. *John G. Buchanan, Jr.,* for respondents. Reported below: 432 Pa. 442, 248 A. 2d 39.

No. 1103. GAINEY ET AL. *v.* BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES ET AL. C. A. 3d Cir. Certiorari denied. *Lawrence J. Richette* for petitioners. *Allen S. Olmsted 2d* for respondent Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees. Reported below: 406 F. 2d 744.

No. 1118. ROBERTS *v.* RESOR, SECRETARY OF THE ARMY, ET AL. C. A. D. C. Cir. Certiorari denied. *Thomas B. Sweeney* for petitioner. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Alan S. Rosenthal,* and *J. F. Bishop* for respondents.

No. 1138. BOSSERT MACHINE CO. ET AL. *v.* CITY OF CINCINNATI. Sup. Ct. Ohio. Certiorari denied. *Philip J. Schneider* for petitioners. *William A. McClain* and *Thomas H. Crush* for respondent. Reported below: 16 Ohio St. 2d 76, 243 N. E. 2d 105.

No. 1145. GORDON *v.* BROOKLYN BAR ASSN. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. *Morton Liftin* for petitioner. *Herbert H. Hefler* for respondent. Reported below: 30 App. Div. 2d 807, 292 N. Y. S. 2d 817.

No. 1150. DURHAM ET AL. *v.* MASON & DIXON LINES, INC. C. A. 6th Cir. Certiorari denied. *H. Solomon Horen* and *Mozart G. Ratner* for petitioners. *Edgar A. Zingman* for respondent. Reported below: 404 F. 2d 864.

No. 1154. LONGFELLOW *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *George A. Daugherty* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 406 F. 2d 415.

No. 1142. ABEX CORP. ET AL. *v.* TRUSTEES OF THE PROPERTY OF NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. ET AL. C. A. 2d Cir. Certiorari denied. *John W. Barnett* for petitioners Abex Corp. et al., and *John F. Hunt, Jr.,* for petitioners Bethlehem Steel Corp. et al. *James Wm. Moore, Joseph W. Bishop, Jr., Joseph Auerbach,* and *Morris Raker* for respondent Smith, Trustee; *Albert X. Bader, Jr.,* for respondent Manufacturers Hanover Trust Co., Trustee, *Joseph Schreiber* and *Wilkie Bushby* for respondent Chase Manhattan Bank, N. A., Trustee, *Lester C. Migdal* and *Lawrence W. Pollack* for respondent New Haven Railroad 4% Bondholders Committee, and *Myron S. Isaacs* for respondent Oscar Gruss & Son. Reported below: 405 F. 2d 50.

No. 1156. CHECKER MOTORS CORP. *v.* CHRYSLER CORP. ET AL. C. A. 2d Cir. Certiorari denied. *Jesse Climenko* and *Herbert B. Lazarus* for petitioner. *Robert Ehrenbard* for respondents. Reported below: 405 F. 2d 319.

No. 839. PATE, WARDEN *v.* PUGH. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted. *William G. Clark,* Attorney General of Illinois, and *John J. O'Toole* and *Donald J. Veverka,* Assistant Attorneys General, for petitioner. *Stanley A. Bass* and *Sam Adam* for respondent. Reported below: 401 F. 2d 6.

No. 1078. CELANESE CORP. *v.* BRENNER, COMMISSIONER OF PATENTS. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE is of the opinion that certiorari should be granted. *Stephen Rackow Kaye* for petitioner. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Morton Hollander* for respondent. Reported below: — U. S. App. D. C. —, 409 F. 2d 430.

No. 1167. SMITH *v.* JAMES IRVINE FOUNDATION ET AL. C. A. 9th Cir. Certiorari denied. *Lyndol L. Young* for petitioner. *Burnham Enersen* for respondent James Irvine Foundation, and *Reid R. Briggs* for respondents Irvine et al. Reported below: 402 F. 2d 772.

No. 1203. BORG-WARNER CORP. *v.* REPUBLIC GEAR CO. C. A. 7th Cir. Certiorari denied. *James E. S. Baker, Robert W. Murphy,* and *George L. Saunders* for petitioner. *Aaron Lewittes* and *Edward I. Rothschild* for respondent. Reported below: 406 F. 2d 57.

No. 1126. FARINELLA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Motion to defer consideration of petition for certiorari denied. Certiorari denied. *Milton E. Grusmark* and *Natalie Baskin* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Roger A. Pauley* for the United States. Reported below: 406 F. 2d 148.

No. 1155. TARTAGLIO ET AL. *v.* DEPARTMENT OF INSTITUTIONS AND AGENCIES, DIVISION OF PUBLIC WELFARE. Sup. Ct. N. J. Motion to defer consideration of petition for writ of certiorari denied. Certiorari denied. *George F. Bason, Jr.,* for petitioners. *Arthur J. Sills,* Attorney General of New Jersey, and *Eugene T. Urbaniak,* Deputy Attorney General, for respondent.

No. 1174. UNITED STEELWORKERS OF AMERICA, AFL–CIO *v.* HAMILTON STEEL PRODUCTS, INC., ET AL. C. A. 7th Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE FORTAS are of the opinion that certiorari should be granted. *Bernard Kleiman, Gilbert Feldman, Elliot Bredhoff, Michael H. Gottesman,* and *George H. Cohen* for petitioner. *J. Robert Geiman* for respondent Union Central Life Insurance Co. Reported below: 404 F. 2d 878.

No. 1147. POLUR *v.* BOTEIN ET AL. Ct. App. N. Y. Motion to dispense with printing petition denied. Certiorari denied. *Sam Polur,* petitioner, *pro se.* *Whitney North Seymour* for respondents.

No. 1149. MOONEYHAN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Lowe Watkins* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Louis M. Kauder,* and *John S. Stephan* for respondent. Reported below: 404 F. 2d 522.

No. 7, Misc. GARDNER *v.* CALIFORNIA. Super. Ct. Cal., County of San Luis Obispo. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Jack K. Weber,* Deputy Attorney General, for respondent.

No. 10, Misc. GARDNER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Jack K. Weber,* Deputy Attorney General, for respondent.

No. 724, Misc. CLARK *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. *Robert Gordon King* and *Louis Peregoff* for petitioner. *Francis B. Burch,* Attorney General of Maryland, and *William E. Brannan,* Assistant Attorney General, for respondent. Reported below: 2 Md. App. 756, 237 A. 2d 768.

No. 1250, Misc. FOGGY *v.* EYMAN, WARDEN, ET AL. Sup. Ct. Ariz. Certiorari denied. *Gary K. Nelson,* Attorney General of Arizona, and *Thomas M. Tuggle,* Assistant Attorney General, for respondents.

No. 545, Misc. CHILDS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *Gerald A. Messerman* for petitioner. Reported below: 14 Ohio St. 2d 56, 236 N. E. 2d 545.

No. 875, Misc. HAMILTON *v.* PATTERSON, VOCATIONAL INSTITUTION SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch*, Attorney General of California, *Doris H. Maier*, Assistant Attorney General, and *Nelson P. Kempsky*, Deputy Attorney General, for respondent.

No. 1207, Misc. MILLER *v.* BAKER, WARDEN. Sup. Ct. N. M. Certiorari denied. *James A. Maloney*, Attorney General of New Mexico, and *James V. Noble*, Assistant Attorney General, for respondent. Reported below: 79 N. M. 392, 444 P. 2d 577.

No. 1233, Misc. JUELICH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 403 F. 2d 523.

No. 1290, Misc. RALPH *v.* MARYLAND. Ct. App. Md. Certiorari denied. *Edward L. Genn* for petitioner. *Francis B. Burch*, Attorney General of Maryland, *Alfred J. O'Ferrall III*, Assistant Attorney General, for respondent.

No. 1408, Misc. BURTON *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 186 Ct. Cl. 172, 404 F. 2d 365.

No. 1445, Misc. WADE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1301, Misc. Pagano *v.* United States. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Kirby W. Patterson* for the United States. Reported below: 403 F. 2d 491.

No. 1459, Misc. Bonton *v.* California. App. Dept., Super. Ct. Cal., County of Sacramento. Certiorari denied. *S. Carter McMorris* for petitioner.

No. 1467, Misc. Devine *v.* United States. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 403 F. 2d 93.

No. 1509, Misc. Wilson *v.* United States. C. A. 2d Cir. Certiorari denied. *William E. Hellerstein* and *Phylis Skloot Bamberger* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 404 F. 2d 531.

No. 1522, Misc. Winkle *v.* Kropp, Warden. C. A. 6th Cir. Certiorari denied. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Stewart H. Freeman,* Assistant Attorney General, for respondent. Reported below: 403 F. 2d 661.

No. 1536, Misc. Johnson *v.* Insurance Department of Pennsylvania et al. Sup. Ct. Pa. Certiorari denied. *Edward O. Spotts* for petitioner. *William C. Sennett,* Attorney General of Pennsylvania, *Charles D. Cowley,* Assistant Attorney General, and *Frederic G. Antoun,* Deputy Attorney General, for respondents. *John P. Walsh* for Insurance Rating Board, intervenor below, in opposition. Reported below: 432 Pa. 543, 248 A. 2d 308.

No. 1521, Misc. GRAYS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 265 Cal. App. 2d 14, 71 Cal. Rptr. 32.

No. 1546, Misc. CURL *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 40 Wis. 2d 474, 162 N. W. 2d 77.

No. 1557, Misc. HAMILTON *v.* FAULKNER. Sup. Ct. Ill. Certiorari denied. *John Unger* for petitioner. *John E. Sebat* for respondent.

No. 1565, Misc. MCCONNELL *v.* WASHINGTON ET AL. Sup. Ct. Wash. Certiorari denied.

No. 1568, Misc. PARKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Philip R. Monahan* for the United States. Reported below: 404 F. 2d 1193.

No. 1577, Misc. FRAZIER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 3 Md. App. 470, 240 A. 2d 306.

No. 1582, Misc. BALL *v.* MARYLAND. C. A. 4th Cir. Certiorari denied.

No. 1584, Misc. FORD *v.* COMSTOCK, CONSERVATION CENTER SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 1589, Misc. CALDWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 405 F. 2d 613.

No. 1588, Misc. Daubin *v.* California. Sup. Ct. Cal. Certiorari denied. *Meredith M. Daubin* for petitioner.

No. 1591, Misc. Hudson *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 1594, Misc. Riordan *v.* Division of Motor Vehicles, Department of Law and Public Safety. Sup. Ct. N. J. Certiorari denied. *Mark F. Hughes, Jr.*, for petitioner. *Arthur J. Sills,* Attorney General of New Jersey, *Elias Abelson,* Assistant Attorney General, and *Thaddeus C. Raczkowski,* Deputy Attorney General, for respondent.

No. 1595, Misc. Montez *v.* Eyman, Warden. C. A. 9th Cir. Certiorari denied. *Gary K. Nelson,* Attorney General of Arizona, for respondent. Reported below: 404 F. 2d 330.

No. 1599, Misc. Nam Sing Shak *v.* Hawaii. Sup. Ct. Hawaii. Certiorari denied.

No. 1603, Misc. Parness *v.* United States. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 403 F. 2d 31.

No. 1611, Misc. Wright *v.* Michigan. Ct. App. Mich. Certiorari denied. *Sam Adam* for petitioner. *Frank J. Kelley,* Attorney General of Michigan, and *Robert A. Derengoski,* Solicitor General, for respondent. Reported below: 12 Mich. App. 369, 163 N. W. 2d 22.

No. 1615, Misc. Odell *v.* Schmidt et al. C. A. 7th Cir. Certiorari denied.

No. 1616, Misc. CHRISTIAN *v.* JACKSON COUNTY. Ct. Crim. App. Okla. Certiorari denied. Reported below: 447 P. 2d 446.

No. 1618, Misc. DENHAM *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Gerald W. Getty, Marshall J. Hartman,* and *James J. Doherty* for petitioner. Reported below: 41 Ill. 2d 1, 241 N. E. 2d 415.

No. 1619, Misc. CRAIG *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 1622, Misc. MOORE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 23 N. Y. 2d 565, 245 N. E. 2d 710.

No. 1624, Misc. TAPLIN *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 1626, Misc. HENDERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Jerome M. Feit* for the United States. Reported below: 404 F. 2d 832.

No. 1638, Misc. GRIFFIN *v.* MARTIN, CORRECTION COMMISSIONER. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. *Paul Taylor* for petitioner.

No. 1647, Misc. MCCRAY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Jerome M. Feit* for the United States.

No. 1648, Misc. HOPSON *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1627, Misc. SWEET *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 1651, Misc. YOUNG *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Sidney M. Glazer* for the United States. Reported below: — U. S. App. D. C. —, 407 F. 2d 720.

No. 1652, Misc. KELLY *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 1653, Misc. FRIZER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 1654, Misc. BERRY *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 242 N. E. 2d 355.

No. 1659, Misc. MANGINI *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1660, Misc. BAXLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 406 F. 2d 397.

No. 1663, Misc. GORUM *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1671, Misc. POLLARD *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1682, Misc. RITTER *v.* MCMANN, WARDEN. C. A. 2d Cir. Certiorari denied. *William E. Hellerstein, Phylis Skloot Bamberger,* and *Harry C. Batchelder, Jr.,* for petitioner.

No. 1672, Misc. Cappetta *v.* Florida. Sup. Ct. Fla. Certiorari denied. *Earl Faircloth,* Attorney General of Florida, and *Charles W. Musgrove,* Assistant Attorney General, for respondent. Reported below: 216 So. 2d 749.

No. 1673, Misc. McCargo *v.* Maryland. Ct. Sp. App. Md. Certiorari denied.

No. 1677, Misc. Tabor, aka Reichner *v.* Virginia. Sup. Ct. App. Va. Certiorari denied.

No. 1679, Misc. Riley *v.* Parker et al. C. A. 9th Cir. Certiorari denied.

No. 1687, Misc. Dearinger *v.* Rhay, Penitentiary Superintendent. Sup. Ct. Wash. Certiorari denied.

No. 1694, Misc. Tinsley *v.* McMann, Warden. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 1699, Misc. Farnsworth *v.* Second District Court. Sup. Ct. Utah. Certiorari denied.

No. 1548, Misc. Aadal *v.* United States. C. A. 2d Cir. Certiorari denied. Mr. Justice Marshall took no part in the consideration or decision of this petition. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Sidney M. Glazer* for the United States.

No. 1105, Misc. Hancock *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *George F. McCanless,* Attorney General of Tennessee, and *Robert H. Roberts,* Assistant Attorney General, for respondent.

No. 1701, Misc. CASEY *v.* LAMBROS, U. S. DISTRICT JUDGE. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold* for respondent.

No. 1703, Misc. WILSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1707, Misc. EVANS *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1724, Misc. WILLIS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

Rehearing Denied.

No. 699. DALY *v.* CALIFORNIA, *ante,* p. 929; and
No. 1506, Misc. HILLERY *v.* CALIFORNIA, *ante,* p. 951. Petitions for rehearing denied.

No. 927. GRANELLO, AKA BURNS *v.* UNITED STATES, 393 U. S. 1095. Petition for rehearing denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

MAY 5, 1969.

Miscellaneous Orders.

No. 776. UTAH PUBLIC SERVICE COMMISSION *v.* EL PASO NATURAL GAS CO. ET AL. Appeal from D. C. Utah. Motion of Colonial Group for leave to file a brief as *amicus curiae* granted. MR. JUSTICE WHITE, MR. JUSTICE FORTAS, and MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *David K. Watkiss* and *James D. McKinney, Jr.,* on the motion. [For earlier order herein, see *ante,* p. 970.]

No. 705. CIPRIANO *v.* CITY OF HOUMA ET AL. Appeal from D. C. E. D. La. [Probable jurisdiction noted, 393 U. S. 1061.] Motion of Louisiana Municipal Assn. for leave to join in the *amicus curiae* brief of the State of Louisiana granted. *John V. Parker* on the motion.

No. 1700, Misc. IN RE DISBARMENT OF SILL. It having been reported to the Court that Norman E. Sill of Washington, District of Columbia, has been disbarred from the practice of law by the United States Court of Appeals for the District of Columbia Circuit, duly entered on the 18th day of February, 1968, and this Court by order of March 10, 1969 [*ante,* p. 902], having suspended the said Norman E. Sill from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent, and that the time within which to file a return to the rule has expired;

IT IS ORDERED that the said Norman E. Sill be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. 1242, Misc. BIVENS *v.* UNITED STATES. C. A. 2d Cir. Application for bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. *Solicitor General Griswold* in opposition.

No. 1064. NORTH CAROLINA *v.* ALFORD. Appeal from C. A. 4th Cir. [Probable jurisdiction noted, *ante,* p. 956.] Motion of appellee for appointment of counsel granted. It is ordered that *Doris R. Bray,* of Greensboro, North Carolina, be, and she is hereby, appointed to serve as counsel for appellee in this case.

No. 622. Maxwell *v.* Bishop, Penitentiary Superintendent. C. A. 8th Cir. [Certiorari granted, 393 U. S. 997.] Motion of Robert Page Anderson et al. for leave to file a brief as *amici curiae* after argument granted. *Anthony G. Amsterdam, Jack Greenberg, Michael Meltsner, Melvyn Zarr,* and *Charles S. Ralston* on the motion.

No. 1192. Coleman et al. *v.* Alabama. Ct. App. Ala. [Certiorari granted, *ante,* p. 916.] Motions of petitioners for appointment of counsel granted. It is ordered that *Charles Tarter, Esquire,* of Birmingham, Alabama, be, and he is hereby, appointed to serve as counsel for petitioners in this case.

No. 1785, Misc. Kinderman *v.* Young, Warden; and No. 1820, Misc. Duckworth *v.* Craven, Warden. Motions for leave to file petitions for writs of habeas corpus denied.

Probable Jurisdiction Noted.

No. 950. Hall et ux. *v.* Beals, Clerk and Recorder of El Paso County, et al. Appeal from D. C. Colo. Probable jurisdiction noted. *John P. Moore,* Deputy Attorney General of Colorado, and *Carroll E. Multz* for appellees. Reported below: 292 F. Supp. 610.

Certiorari Granted. (See also No. 642, Misc., *ante,* p. 831; and No. 877, Misc., *ante,* p. 846.)

No. 1223. Adickes *v.* S. H. Kress & Co. C. A. 2d Cir. Motion to dispense with printing petition granted. Certiorari granted. *Eleanor Jackson Piel* for petitioner. *Sanford M. Litvack, James R. Withrow, Jr.,* and *Alfred H. Hoddinott, Jr.,* for respondent. Reported below: 409 F. 2d 121.

No. 1106. EVANS ET AL. *v.* ABNEY ET AL. Sup. Ct. Ga. Certiorari granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Jack Greenberg, James M. Nabrit III, Charles L. Black, Jr.,* and *Anthony G. Amsterdam* for petitioners. *Frank C. Jones* for respondents. Reported below: 224 Ga. 826, 165 S. E. 2d 160.

Certiorari Denied.

No. 946. BEECH-NUT LIFE SAVERS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Leonard Joseph* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 406 F. 2d 253.

No. 982. TELEDYNE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Charles G. Bakaly, Jr.,* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 405 F. 2d 1182.

No. 1071. GROENDYKE TRANSPORT, INC. *v.* DAVIS, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD, ET AL. C. A. 5th Cir. Certiorari denied. *Payne Ratner* and *Joe H. Tonahill* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Linda Sher* for respondents. Reported below: 406 F. 2d 1158.

No. 1111. HADLEY *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. *William C. Erbecker* and *James Manahan* for petitioner. *Theodore L. Sendak,* Attorney General of Indiana, and *Lloyd C. Hutchinson* and *William F. Thompson,* Deputy Attorneys General, for respondent. Reported below: — Ind. —, 238 N. E. 2d 888.

No. 1157. MISSOURI PACIFIC RAILROAD CO. *v.* SOUTHERN PACIFIC CO. Ct. Civ. App. Tex., 14th Sup. Jud. Dist. Certiorari denied. *Ben G. Sewell* for petitioner. *Tom M. Davis* for respondent. Reported below: 430 S. W. 2d 900.

No. 1159. LEWIS ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Charles A. Bellows* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Jerome M. Feit* for the United States. Reported below: 406 F. 2d 486.

No. 1161. CARLINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *James E. Birdsall* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Joseph M. Howard* for the United States. Reported below: 400 F. 2d 56.

No. 1164. KANAREK *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Irving A. Kanarek,* petitioner, *pro se. Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Robert V. Zener* for the United States. Reported below: 184 Ct. Cl. 125, 394 F. 2d 525.

No. 1166. GERHARD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Henry Mark Holzer* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States.

No. 1171. BLOOMFIELD *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *Milton T. Simmons* and *Donald L. Ungar* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for respondent. Reported below: 404 F. 2d 656.

No. 1172. DENVER UNION STOCKYARD CO. ET AL. *v.* DENVER LIVE STOCK COMMISSION CO. C. A. 10th Cir. Certiorari denied. *Winston S. Howard* for petitioners. *Maurice Reuler* for respondent. Reported below: 404 F. 2d 1055.

No. 1177. FLUOR CORP., LTD., ET AL. *v.* UNITED STATES EX REL. MOSHER STEEL CO.;

No. 1178. WARD INDUSTRIES CORP. *v.* UNITED STATES EX REL. MOSHER STEEL CO.; and

No. 1179. UNION TANK CAR CO. *v.* UNITED STATES EX REL. MOSHER STEEL CO. ET AL. C. A. 9th Cir. Certiorari denied. *Harold C. Warnock* for petitioners in No. 1177, *R. Graeme Smith* for petitioner in No. 1178, and *Francis J. McConnell* and *Robert A. May* for petitioner in No. 1179. *Maurice E. Purnell, Sr.,* for Mosher Steel Co. in all three cases. Reported below: 405 F. 2d 823.

No. 1180. CARLTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Arnold D. Levine* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 391 F. 2d 684.

No. 1183. ELECTRONIC SYSTEMS INVESTMENT CORP. *v.* SMALL BUSINESS ADMINISTRATION. C. A. 4th Cir. Certiorari denied. *John Lewis Kelly* for petitioner. *Solicitor General Griswold* for respondent. Reported below: 405 F. 2d 188.

No. 1184. FIRST NATIONAL INDUSTRIES, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *William Waller* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Jonathan S. Cohen* for respondent. Reported below: 404 F. 2d 1182.

No. 1188. Diric *v.* Immigration and Naturalization Service. C. A. 9th Cir. Certiorari denied. *Myron L. Borawick* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Kirby W. Patterson* for respondent. Reported below: 400 F. 2d 658.

No. 1193. Thomas *v.* United States. C. A. 6th Cir. Certiorari denied. *James R. Willis* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States.

No. 1196. Echard *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. *Allan Sherry* for petitioner.

No. 1202. Speyer, Inc., et al. *v.* Humble Oil & Refining Co. et al. C. A. 3d Cir. Certiorari denied. *William W. Knox* and *John G. Gent* for petitioners. *John M. Wolford, Cloyd R. Mellott,* and *Barton Z. Cowan* for Humble Oil & Refining Co., and *Raymond G. Hasley* for A. O. Smith Corp., respondents. Reported below: 403 F. 2d 766.

No. 983. Hanna *v.* United States. C. A. 5th Cir. Certiorari denied. *Guy Johnson* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Sidney M. Glazer* for the United States. Reported below: 404 F. 2d 405.

Mr. Justice Fortas, with whom Mr. Justice Douglas joins, dissenting.

Petitioner asks that we review the decision of the Court of Appeals for the Fifth Circuit affirming his convictions for defrauding the telephone company in violation of 18 U. S. C. § 1343 and for use of interstate commerce facilities for illegal gambling in violation of 18 U. S. C.

§§ 1084 and 1952. The only evidence against petitioner was obtained by the telephone company's action in tapping his telephone line or was the product of information gained from that tap. The company became suspicious that petitioner was using a "blue box" to avoid payment for long-distance telephone calls. A "blue box" is an electronic signaling device which can be used to bypass the equipment which automatically records tolls on direct-dialed long-distance calls. An electronic device—which did not record the content of any conversations—confirmed the presence on the line of the 2,600-cycle tone characteristic of the operation of a "blue box." Company security officers then connected to petitioner's line a tape recorder which began recording the conversations on the line whenever the 2,600-cycle tone appeared and which automatically cut off after 35 to 45 seconds.

The recording instrument was used for about three weeks. The FBI was then informed of the recordings, and the recordings were turned over to a grand jury in response to a subpoena. Using the recorded information, the FBI obtained a warrant and conducted a search of petitioner's home.

Section 605 of the Federal Communications Act of 1934, 48 Stat. 1103, 47 U. S. C. § 605, prohibits the interception and divulgence of telephone messages.[1] It is argued—and the Fifth Circuit held—that the information was not unlawfully obtained because § 605 excludes from its prohibitions certain divulging of telephone messages by

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[1] This tap was installed without a trespass, but if placed by law enforcement officers, it would clearly have violated the protections of the Fourth Amendment, as defined by this Court in *Katz* v. *United States,* 389 U. S. 347 (1967). The tap was, however, installed before the decision in *Katz* was announced. This Court has determined that it will not consider the constitutionality of non-trespassory invasions which took place prior to *Katz*. *Desist* v. *United States, ante,* p. 244; *Kaiser* v. *New York, ante,* p. 280. Accordingly, I consider only statutory questions here.

"[a] person . . . transmitting, or assisting in transmitting" conversations.

In a similar case, *Bubis* v. *United States,* 384 F. 2d 643 (C. A. 9th Cir. 1967), the Ninth Circuit held that under § 605 the telephone company was not allowed to continue tapping its subscribers' lines to detect fraud "after ample evidence had been secured of the illegal use . . . of the company's facilities." 384 F. 2d, at 648. The tap in *Bubis* recorded the whole conversation and not merely the first part, but an essential fact—that the interception was more extensive than necessary to detect fraud—is the same in both cases.

I would grant certiorari in this case to resolve the area of conflict between circuits and to determine whether § 605 permits the telephone company to intercept and divulge personal communications which are used in the expectation of freedom from "the uninvited ear." *Katz* v. *United States,* 389 U. S. 347, 352 (1967).[2]

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[2] The Government argues that the applicability of § 605 to events such as this is now of only academic interest because of the recent enactment of § 802 of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 212, 18 U. S. C. § 2510 *et seq.* (1964 ed., Supp. IV). That argument is untenable. Section 2511 (2)(a) of 18 U. S. C. declares:

> "It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided,* That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks."

It is by no means clear that the new statute would authorize this kind of conduct if a similar case occurred today. Unless it did, § 605 would still apply and the same problems that exist in this case would arise again.

No. 1251. UNITED FOREST PRODUCTS CO., INC. *v.* BAXTER ET AL. C. A. 8th Cir. Certiorari denied. *E. Eugene Davis, F. J. O'Hara, Jr.,* and *Hugh Lynch, Jr.,* for petitioner. *Donald A. Wine* for respondents. Reported below: 406 F. 2d 1120.

No. 1109. WEED *v.* BILBREY ET AL. Sup. Ct. Fla. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. *Frederick William Wagner* and *Peter G. Kalogridis* for petitioner. *William A. Gillen* for respondents. Reported below: 215 So. 2d 479.

No. 1131. BANKERS COMMERCIAL LIFE INSURANCE CO. ET AL. *v.* AMERICAN HOSPITAL ASSN. ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *G. H. Kelsoe, Jr.,* for petitioners. *Otis B. Gary* for respondents. Reported below: 403 F. 2d 718.

No. 1197. BENTLEY *v.* NEW HAMPSHIRE. C. A. 1st Cir. Motion to dispense with printing petition granted. Certiorari denied. *George S. Pappagianis,* Attorney General of New Hampshire, and *David H. Souter,* Assistant Attorney General, for respondent. Reported below: 406 F. 2d 1064.

No. 921, Misc. KENNEDY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Arthur I. Vorys* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 397 F. 2d 16.

No. 1108, Misc. BULLARD *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States.

No. 1420, Misc. Spivey *v.* Virginia. Sup. Ct. App. Va. Certiorari denied. *Samuel A. Garrison III* for respondent.

No. 1003, Misc. Sullivan *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, and *Robert R. Granucci* and *Louise H. Renne,* Deputy Attorneys General, for respondent.

No. 1031, Misc. Dorrough *v.* United States. C. A. 5th Cir. Certiorari denied. *W. B. West III* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 385 F. 2d 887, 397 F. 2d 811.

No. 1576, Misc. Eaton *v.* United States. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States.

No. 1621, Misc. Dancis *v.* United States. C. A. 2d Cir. Certiorari denied. *Alan H. Levine, Melvin L. Wulf,* and *Marvin M. Karpatkin* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Roger A. Pauley* for the United States. Reported below: 406 F. 2d 729.

No. 1665, Misc. Anderson *v.* Wilson, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 397 F. 2d 255.

No. 1675, Misc. Saavedra *v.* Connecticut. Sup. Ct. Conn. Certiorari denied. *William D. Graham* for petitioner.

No. 1644, Misc. SHOCK *v.* TESTER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 405 F. 2d 852.

No. 1664, Misc. ALLEN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1680, Misc. CHESTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Thomas B. Rutter* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Robert G. Maysack* for the United States. Reported below: 407 F. 2d 53.

No. 1685, Misc. HORTON *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied.

No. 1689, Misc. HARRIS *v.* MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied.

No. 1710, Misc. BRADFORD *v.* GEORGIA. Ct. App. Ga. Certiorari denied. *Guy B. Scott, Jr.,* for petitioner. Reported below: 118 Ga. App. 457, 164 S. E. 2d 264.

No. 1702, Misc. DENMAN ET AL. *v.* COUNTY OF BARNSTABLE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 404 F. 2d 64.

No. 1704, Misc. GILCHRIST *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *H. Elliot Wales* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Philip R. Monahan* for the United States.

No. 1708, Misc. HUNT *v.* EYMAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 405 F. 2d 384.

No. 1688, Misc. HOUGHTALING *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *Humes J. Franklin* for petitioner. Reported below: 209 Va. 309, 163 S. E. 2d 560.

No. 1713, Misc. JESSY *v.* SUPERIOR COURT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 1722, Misc. THERIAULT *v.* PEEK ET AL. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for respondents. Reported below: 406 F. 2d 117.

No. 1728, Misc. RUSH *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 1729, Misc. MEADOWS *v.* WARDEN, BROOKLYN HOUSE OF DETENTION. Ct. App. N. Y. Certiorari denied.

No. 1741, Misc. WHITEHEAD *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Stewart H. Freeman,* Assistant Attorney General, for respondent.

No. 1744, Misc. LOCKHART *v.* HENDRICK, COUNTY PRISONS SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 1055, Misc. REED *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *George Howard, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 401 F. 2d 756.

No. 1481, Misc. BRADFORD *v.* MICHIGAN. Ct. App. Mich. Motion for leave to supplement petition granted. Certiorari denied. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Stewart H. Freeman,* Assistant Attorney General, for respondent. Reported below: 10 Mich. App. 696, 160 N. W. 2d 373.

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

During the early morning hours of November 5, 1962, two Benton Harbor, Michigan, policemen stopped an automobile in the course of investigating a robbery. They were shot by the occupants of the vehicle and seriously wounded. Shortly thereafter LeRoy Payne was arrested. He was brutally treated by his captors until he confessed, implicating petitioner. Payne then became the State's chief trial witness. Petitioner was convicted of assault with intent to commit murder and was sentenced to a term of 20 to 40 years.

At petitioner's trial the State conceded that Payne testified truthfully concerning the manner in which the police had obtained his confession. The police campaign to compel Payne to confess began upon Payne's arrest. On the way to the police station Payne was called a "dirty bastard" and a "nigger." The police suggested that they might throw him out of the police car and then shoot him, claiming that he had attempted to escape. Payne was questioned for two days without food, water, or sleep; he was informed that all three necessities of life would be provided once he confessed and informed the police as to the identity of his accomplice. During the course of questioning Payne was beaten about the face until both eyes were blackened, was kicked and was held by one officer while the other twisted his fingers and then squeezed his testicles.

Finally, the police threatened to prosecute Payne's wife for perjury and to have his children taken away. The State admits that the confession implicating petitioner was the product of these tactics.

Prior to petitioner's trial Payne had entered a guilty plea but had not as yet been sentenced. Although he stated that his testimony was not prompted by fear, Payne later signed an affidavit to the contrary. In this affidavit, presented to the trial court at petitioner's motion for a new trial, Payne insisted:

> "At the time of Mr. Bradford [petitioner's] trial I was in fear of my life, safety of my family. As a result of this I gave false testimony at the preliminary hearing and trial of Mr. Bradford. The only part of my testimony [which was true] at that time was that of the treatment I received at the hands of the police."

On June 15, 1967, Payne's guilty plea was set aside on the basis that it was involuntary.

It is now a commonplace that coerced confessions are inadmissible at criminal trials because they are untrustworthy and the methods used to obtain them offend the principle that our system of criminal justice is accusatorial not inquisitorial. *Rogers* v. *Richmond,* 365 U. S. 534, 540–541 (1961). Nor do I think it relevant that the coercion in this case was exerted against the chief state witness rather than the accused. As was said by Mr. Justice Rutledge, dissenting in part in *Malinski* v. *New York,* 324 U. S. 401, 430–431 (1945):

> "Due process does not permit one to be convicted upon his own coerced confession. It should not allow him to be convicted upon a confession wrung from another by coercion. A conviction supported only by such a confession could be but a variation of trial by ordeal."

Admission of Payne's trial testimony was, in my view, a violation of due process as it was cut from the same fabric that produced his original statement. Even if the brutality ceased at the time Payne confessed, he remained under the control of those who had elicited the confession. See *Chambers* v. *Florida,* 309 U. S. 227, 235 (1940). Faced with memories of his ordeal and with the fact that he had not as yet been sentenced, Payne had little choice but to repeat at trial what the police had earlier forced from his lips, as is conclusively demonstrated by the fact that Payne's plea has been found involuntary.

Since I cannot separate Payne's trial testimony from the original coercion, and because I believe that the majesty of the law cannot be enhanced by a conviction based on such medieval cruelty, I would grant certiorari and reverse this conviction.

No. 1753, Misc. PURNELL *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1634, Misc. DERENGOWSKI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 404 F. 2d 778.

Rehearing Denied.

No. 69. BROTHERHOOD OF RAILROAD TRAINMEN ET AL. *v.* JACKSONVILLE TERMINAL CO., *ante,* p. 369. Petition for rehearing denied. MR. JUSTICE FORTAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 62. **Kaiser** *v.* **New York,** *ante,* p. 280;

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No. 857, Misc. **Bush** *v.* **United States,** 393 U. S. 532; and

No. 1457, Misc. **Glass** *v.* **United States,** *ante,* p. 939. Petitions for rehearing denied.

May 12, 1969.

Dismissal Under Rule 60.

No. 5, Misc. **Sanchez** *v.* **California.** Sup. Ct. Cal. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Charles F. Prael* for petitioner. *Thomas C. Lynch,* Attorney General of California, and *Edward P. O'Brien* and *Karl S. Mayer,* Deputy Attorneys General, for respondent. Reported below: 65 Cal. 2d 814, 423 P. 2d 800. [For earlier order herein, see 389 U. S. 999.]

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2. *Sherman Act—Newspapers—Joint operating agreement.*—The violations of § 1 of the Act are plain, as price fixing is illegal *per se,* pooling of profits pursuant to an inflexible ratio reduces incentives to compete, and the agreement not to engage in any other publishing business in Pima County is a division of fields proscribed by the Act. Citizen Publishing Co. v. United States, p. 131.

3. *Sherman Act—Tying arrangements—Credit.*—The arrangement here, where credit is provided by one corporation on condition that a product be purchased from another corporation, and where the borrower contracts to obtain a large sum beyond that needed to pay seller for the products purchased, is readily distinguished from sale of a single product on credit by an individual seller. Where credit is source of tying leverage used to restrain competition, it is treated no differently under the antitrust laws from other goods and services. Fortner Enterprises v. U. S. Steel, p. 495.

4. *Sherman Act—Tying arrangements—Illegality per se.*—The District Court incorrectly assumed that the standards in *Northern*

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Pacific R. Co. v. *United States,* 356 U. S. 1, for determining the illegality *per se* of a tying agreement had to be met before petitioner could prevail on the merits. In any event the facts raised by petitioner, if proved at trial, make the *per se* doctrine applicable to the tying arrangement here. Fortner Enterprises v. U. S. Steel, p. 495.

5. *Sherman Act—Tying arrangements—Volume of commerce.*—Volume of commerce allegedly foreclosed was substantial when measured as it should be, not by the portion of the total accounted for by petitioner's contracts, but by the total volume of sales tied by respondents' challenged sales policy. Fortner Enterprises v. U. S. Steel, p. 495.

6. *Sherman and Clayton Acts—Failing company doctrine.*—Requirements of failing company doctrine were not met, as there was no evidence that the Citizen's owners were thinking of liquidating or selling the company or that the joint operating agreement was the last straw at which the company grasped; it was not established that the acquiring company was the only available purchaser; and the prospects of reorganization through receivership or through Chapter X or XI of the Bankruptcy Act were neither dim nor nonexistent. Citizen Publishing Co. v. United States, p. 131.

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I. Congressional Districts.

1. *Population variances—Good-faith effort.*—Art. I, § 2, requires that States create congressional districts which provide equal representation for equal numbers of people with "only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." Kirkpatrick v. Preisler, p. 526; Wells v. Rockefeller, p. 542.

2. *Population variances—Justification.*—Unless population variances among districts are shown to have resulted despite State's good-faith effort to achieve equality, the State must justify each variance, no matter how small. Variances based on creation of districts with specific interest orientations, practical or partisan politics, eligible voter population without a serious effort to ascertain

CONSTITUTIONAL LAW—Continued.

number of eligible voters in each district, population shifts without systematic application throughout the State, or claims of geographic compactness, are generally unacceptable. Kirkpatrick v. Preisler, p. 526.

3. *Variances — Sub-states.* — Holding of *Kirkpatrick* v. *Preisler, ante,* p. 526, requires equalized population in all congressional districts in a State and is not satisfied by equalizing population only within certain defined sub-states; and variances cannot be justified by the fact that some districts are constructed of entire counties. Wells v. Rockefeller, p. 542.

II. Due Process.

1. *Civil rights demonstrators—Disorderly conduct convictions—No evidentiary support.*—Petitioners, peaceful civil rights demonstrators who were arrested and convicted for disorderly conduct when they failed to disperse on police orders, were denied due process since there was no evidentiary support for their convictions. The convictions were for demonstrating, not for refusing to obey police orders. Gregory v. Chicago, p. 111.

2. *Lineup identification — Suggestiveness.* — Although rule that accused must be given opportunity to be represented by counsel at lineup does not apply to lineups conducted prior to June 12, 1967, *Stovall* v. *Denno,* 388 U. S. 293, the conduct of identification procedures must not be "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to be a denial of due process. The suggestive elements in the repeated confrontations here so undermined the reliability of the eyewitness identification as to violate due process. Foster v. California, p. 440.

III. Equal Protection of the Laws.

1. *Absentee ballots—Unsentenced inmates.*—Illinois' failure to provide absentee ballots for unsentenced inmates of Cook County jail awaiting trial does not violate the Equal Protection Clause. There is nothing in the record to show that Illinois has precluded appellants from voting, and constitutional safeguards are not offended by the different treatment accorded unsentenced inmates incarcerated within and those incarcerated without their counties of residence. McDonald v. Board of Election, p. 802.

2. *Disqualification of candidates in Alabama election.*—Disqualification in the 1968 election of National Democratic Party of Alabama candidates on ground that they failed to meet requirements of Alabama Corrupt Practices Act which their opponents did not have to meet constituted an unequal application of law in violation of the Equal Protection Clause of the Fourteenth Amendment. Hadnott v. Amos, p. 358.

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3. *Nominating petitions—Signature requirements.*—Illinois statute providing that nominating petitions for independent candidates must have 25,000 signatures, including 200 signatures from each of at least 50 of the State's 102 counties, applies a rigid, arbitrary formula to sparsely settled counties and populous counties alike, and thus discriminates against the residents of the populous counties in the exercise of their political rights in violation of the Equal Protection Clause. *MacDougall* v. *Green,* 335 U. S. 281, overruled. Moore v. Ogilvie, p. 814.

4. *Welfare recipients — Residence requirements.* — The statutory prohibition of welfare benefits to residents of less than a year creates a classification which denies equal protection of the laws because the interests allegedly served by the classification either may not constitutionally be promoted by government or are not compelling governmental interests. Shapiro v. Thompson, p. 618.

IV. Fifth Amendment.

Fifth Amendment—Due process—Residence requirements.—The one-year waiting period requirement for public welfare assistance in the District of Columbia, adopted by Congress as an exercise of federal power, is an unconstitutional discrimination which violates the Due Process Clause of the Fifth Amendment. Shapiro v. Thompson, p. 618.

V. First Amendment.

1. *Civil rights demonstrators—Disorderly conduct.*—Conviction of civil rights demonstrators, who were arrested and convicted for disorderly conduct when they failed to disperse on police orders, reversed since trial judge's charge allowed jury to convict for acts protected by the First Amendment. Gregory v. Chicago, p. 111.

2. *Obscene films—Private possession.*—The First Amendment as made applicable to the States by the Fourteenth prohibits making mere private possession of obscene material a crime. The Constitution protects the right to receive information and ideas, regardless of their social worth, and to be generally free from governmental intrusions into one's privacy and control of one's thoughts. Stanley v. Georgia, p. 557.

3. *Parade permits—Licensing standards.*—A law subjecting the right of free expression in publicly owned places to the prior restraint of a license, without narrow, objective, and definite standards is unconstitutional, and a person faced with such law may ignore it and exercise his First Amendment rights. Shuttlesworth v. Birmingham, p. 147.

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4. *Picketing and parading—Use of streets.*—Picketing and parading may constitute methods of expression entitled to First Amendment protection, and use of the streets for that purpose, though subject to regulation, may not be wholly denied; and since the terms of § 1159 of the Birmingham General Code gave the City Commission unbridled authority to issue or withhold permits without reference to legitimate regulation of public streets and sidewalks, the ordinance would be, absent a limiting construction, unconstitutional on its face. Shuttlesworth v. Birmingham, p. 147.

VI. Fourth Amendment.

1. *Electronic eavesdropping — Prospective application. — Katz* v. *United States*, 389 U. S. 347, which held that the reach of the Fourth Amendment "cannot turn upon the presence or absence of a physical intrusion into any given enclosure," and that every electronic eavesdropping upon private conversations is a search and seizure which, as a general rule, can comply with constitutional standards only when authorized by a magistrate on a showing of probable cause under precise limitations and safeguards, to the extent that it departed from previous holdings of the Court, is to be applied prospectively only. Desist v. United States, p. 244.

2. *Electronic surveillance — Disclosure by Government.* — If the surveillance is found to have been unlawful, and if petitioner is found to have standing, the Government must disclose to him the records of those overheard conversations which the Government was not entitled to use in building its case against him. Alderman v. United States, p. 165.

3. *Electronic surveillance—Suppression of evidence.*—Suppression of product of Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, and not those who are aggrieved solely by the introduction of damaging evidence. Thus, codefendants and coconspirators have no special standing and cannot prevent the admission against them of information which has been obtained through electronic surveillance which is illegal against another. Alderman v. United States, p. 165.

4. *Fingerprint evidence—Unlawful detention.*—Detentions for the sole purpose of obtaining fingerprints are subject to the constraints of the Fourth Amendment, and fingerprint evidence is no exception to the rule that all evidence obtained by searches and seizures in violation of the Constitution is inadmissible in a state court. Davis v. Mississippi, p. 721.

CONSTITUTIONAL LAW—Continued.

5. *Fingerprints — Investigations.* — It is not determined here whether Fourth Amendment requirements could be met by narrowly circumscribed procedures for obtaining, during a criminal investigation, fingerprints of persons for whom there is no probable cause for arrest, since no attempt was made in this case to use procedures which might comply with that Amendment. Davis v. Mississippi, p. 721.

6. *Search of duffel bag—Joint users.*—Clothing from petitioner's duffel bag was found in course of a lawful search since co-indictee, a joint user of the bag, had authority to consent to its search. Frazier v. Cupp, p. 731.

7. *Suppression of evidence—Standing.*—Petitioner would be entitled to the suppression of evidence violative of the Fourth Amendment where the Government unlawfully overheard conversations of the petitioner himself, or where the conversations occurred on his premises, whether or not he was present or participated therein. Alderman v. United States, p. 165.

8. *Wiretapping—Prospectivity.*—Evidence obtained by wiretapping conducted in 1964 pursuant to warrant issued under N. Y. Code Crim. Proc. § 813–a is admissible in state criminal trial, since wiretapping occurred before (1) *Katz* v. *United States,* 389 U. S. 347, overruled prior decisions that the Fourth Amendment encompassed seizures of speech only if there was a trespass or physical intrusion of the speaker's constitutionally protected area, and (2) *Lee* v. *Florida,* 392 U. S. 378, extended the rule excluding evidence violative of § 605 of the Federal Communications Act; and both *Katz* v. *United States* and *Lee* v. *Florida* have been held to apply prospectively only. Kaiser v. New York, p. 280.

VII. Freedom of Speech.

1. *New York flag statute—Alternative grounds.*—Application of New York flag statute to appellant was violative of rights of free expression assured against state infringement by the Fourteenth Amendment, because it permitted him to be punished merely for speaking defiant or contemptuous words about the American flag, and the record here is insufficient to eliminate the possibility that his words were the sole basis of his conviction or that he was convicted for both his words and his deed. Street v. New York, p. 576.

2. *Threats against the President—Political hyperbole.*—Petitioner's remark during political debate that if inducted into Army (which he vowed would never occur) and made to carry a rifle "the first man I want to get in my sights is L. B. J.," was crude political

CONSTITUTIONAL LAW—Continued.

hyperbole which in light of its context and conditional nature did not constitute knowing and willful threat against the President within the coverage of 18 U. S. C. § 871 (a). Watts v. United States, p. 705.

VIII. Freedom of Speech and Press.

Anonymous political handbills—Case or controversy.—Since New York statute prohibits only anonymous handbills directly pertaining to election campaigns and it was wholly conjectural that another occasion might arise when appellee would be prosecuted for distributing the handbills because his sole concern related to a Congressman who would not likely be a candidate again, the controversy lacked "sufficient immediacy and reality" to warrant issuance of a declaratory judgment. Golden v. Zwickler, p. 103.

IX. Freedom of the Press.

Antitrust Acts—Newspapers.—The decree in this antitrust action requiring divestiture of newspaper publishing company and modification of joint operating agreement deals only with private restraints on business competition and does not regulate news gathering or dissemination in derogation of First Amendment rights. Citizen Publishing Co. v. United States, p. 131.

X. Right to Travel.

Migration of indigents — Residence requirements. — Since the Constitution guarantees the right of interstate movement, the purpose of deterring the migration of indigents into a State is impermissible and cannot serve to justify the classification created by the one-year waiting period. A State may no more try to fence out those indigents who seek higher welfare payments than it may try to fence out indigents generally. Shapiro v. Thompson, p. 618.

XI. Self-Incrimination.

Police custody—Miranda warnings.—Use of admissions at petitioner's murder trial obtained by police who, while he was in their custody in his bedroom at a boarding house, questioned him about incriminating facts without first informing him of his rights to remain silent, to have a lawyer's advice before making a statement, and to have a lawyer appointed to assist him if he could not afford to hire one, violated the Self-Incrimination Clause of the Fifth Amendment made applicable to the States by the Fourteenth. Orozco v. Texas, p. 324.

XII. Sixth Amendment.

1. *Interrogation—Right to counsel.*—In context of this case, where it is possible that questioning officer took petitioner's remark about

CONSTITUTIONAL LAW—Continued.

seeing an attorney not as a request that the interrogation cease but as a passing comment, there was no denial of the right to counsel such as existed in *Escobedo* v. *Illinois,* 378 U. S. 478; and *Miranda* v. *Arizona,* 384 U. S. 436, which was decided after petitioner's trial is not applicable under *Johnson* v. *New Jersey,* 384 U. S. 719. Frazier v. Cupp, p. 731.

2. *Veniremen excused for cause—General objections to death penalty.*—Since several veniremen were excused for cause apparently because they voiced general objections to the death penalty, it appears that the sentence of death cannot constitutionally stand under *Witherspoon* v. *Illinois,* 391 U. S. 510, and the cause is remanded to the District Court where this belated issue may be fully considered. Boulden v. Holman, p. 478.

CONTEMPT. See also **Constitutional Law,** III, 2; **Elections,** 2; **Voting Rights Act of 1965.**

Order of Supreme Court—District Court's temporary restraining order—Failure to place candidates on Alabama ballot.—Decision on motion that this Court initiate contempt proceeding against Greene County Probate Judge for allegedly disobeying this Court's order in *Hadnott* v. *Amos, ante,* p. 358, restoring District Court's temporary restraining order, deferred pending timely initiation and completion of proceedings in District Court to determine whether the Judge's failure to place certain candidates on the ballot constituted contempt of the District Court. In re Herndon, p. 399.

CONTEMPT OF FLAG. See **Constitutional Law,** VII, 1; **Jurisdiction,** 1.

CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE. See **Judicial Review; Submerged Lands Act of 1953,** 1–3.

CONVERSATIONS. See **Constitutional Law,** VI, 2–3, 7; **Evidence,** 2; **Procedure,** 12.

COOK COUNTY. See **Constitutional Law,** III, 1.

CORRUPT PRACTICES ACT. See **Constitutional Law,** III, 2; **Elections,** 2; **Voting Rights Act of 1965.**

COUNSEL. See **Constitutional Law,** II, 2; VI, 6; XI; XII, 1; **Evidence,** 3; **Procedure,** 7, 11; **Trials.**

COUNTIES. See **Constitutional Law,** I, 3; III, 1, 3; **Elections,** 1; **Mootness.**

COURTS. See **Constitutional Law,** VI, 2–3, 7; **Evidence,** 2; **Grand Juries; Habeas Corpus,** 1–2; **Jurisdiction,** 4; **Procedure,** 3, 6, 8, 12.

CREDIBILITY. See **Constitutional Law,** II, 2; **Procedure,** 7.

CREDIT. See **Antitrust Acts,** 3-5.

CRIMINAL LAW. See **Constitutional Law,** II, 1-2; V, 1-4; VI, 1-8; VII, 1-2; VIII; XI; XII, 1-2; **Declaratory Judgments,** 1-2; **Evidence,** 1-3; **Federal Rules of Criminal Procedure,** 1-3; **Grand Juries; Habeas Corpus,** 1-2; **Juries; Jurisdiction,** 1, 4; **Obscenity; Post-Conviction Relief; Procedure,** 3-7, 9-12; **Statutory Construction; Trials.**

DEATH PENALTY. See **Constitutional Law,** XII, 2; **Juries.**

DEBATE. See **Constitutional Law,** VII, 2.

DECEDENT'S REPRESENTATIVES. See **Admiralty; Longshoremen's and Harbor Workers' Compensation Act.**

DECLARATIONS OF INTENT. See **Constitutional Law,** III, 2; **Elections,** 2; **Voting Rights Act of 1965.**

DECLARATORY JUDGMENTS. See also **Constitutional Law,** VIII; **Procedure,** 8.

1. *Anonymous political handbills—Congressional candidate—Case or controversy.*—Since New York statute prohibits only anonymous handbills directly pertaining to election campaigns and it was wholly conjectural that another occasion might arise when appellee would be prosecuted for distributing the handbills because his sole concern related to a Congressman who would not likely be a candidate again, the controversy lacked "sufficient immediacy and reality" to warrant issuance of a declaratory judgment. Golden v. Zwickler, p. 103.

2. *Constitutional issues — Case or controversy.* — In field of declaratory judgments as elsewhere constitutional issues cannot be adjudicated except in actual cases presenting concrete legal issues. Golden v. Zwickler, p. 103.

DECREES. See **Certiorari.**

DEDUCTIONS. See **Taxes,** 1.

DEEP TANK OPENING. See **Admiralty; Longshoremen's and Harbor Workers' Compensation Act.**

DEFENSES. See **Post-Conviction Relief; Procedure,** 5, 9-10.

DEMONSTRATIONS. See **Constitutional Law,** II, 1; V, 1, 3-4; **Statutory Construction.**

DEPENDENTS. See **Admiralty; Longshoremen's and Harbor Workers' Compensation Act.**

DEPLETION ALLOWANCE. See **Taxes,** 1.

DETENTION. See **Constitutional Law,** VI, 4–5.

DEVICES. See **Federal Food, Drug, and Cosmetic Act.**

DISCLOSURE BY GOVERNMENT. See **Procedure,** 12.

DISCOVERY. See **Habeas Corpus,** 1–2; **Procedure,** 6.

DISCRETION. See **Constitutional Law,** V, 3–4; **Grand Juries; Judicial Review; Procedure,** 3; **Statutory Construction; Submerged Lands Act of 1953,** 1–2.

DISCRIMINATION. See **Constitutional Law,** III, 2, 4; IV; V, 3–4; **Contempt; Elections,** 2; **Grand Juries; Procedure,** 3; **Statutory Construction; Voting Rights Act of 1965.**

DISCS. See **Federal Food, Drug, and Cosmetic Act.**

DISORDERLY CONDUCT. See **Constitutional Law,** II, 1; V, 1.

DISQUALIFICATION. See **Constitutional Law,** III, 2; **Contempt; Elections,** 2; **Voting Rights Act of 1965.**

DISTRICT COURTS. See **Constitutional Law,** III, 2; **Contempt; Elections,** 2; **Federal Rules of Criminal Procedure,** 3; **Grand Juries; Habeas Corpus,** 1, 2; **Jurisdiction,** 3; **Procedure,** 3, 6, 12; **Voting Rights Act of 1965.**

DISTRICT OF COLUMBIA. See **Constitutional Law,** III, 4; IV; X.

DISTRICTS. See **Constitutional Law,** I, 1–3; **Elections,** 1.

DIVERSITY JURISDICTION. See **Jurisdiction,** 2–3.

DIVERSITY SUITS. See **Jurisdiction,** 2–3.

DIVESTITURE. See **Antitrust Acts,** 2, 6; **Constitutional Law,** IX.

DOCTORAL DISSERTATIONS. See **Taxes,** 2.

DOUBLE DEDUCTIONS. See **Taxes,** 1.

DREDGED CHANNELS. See **Judicial Review; Submerged Lands Act of 1953,** 1–2.

DRUGS. See **Federal Food, Drug, and Cosmetic Act.**

DRYING ROCKS. See **Submerged Lands Act of 1953,** 1–2.

DUE PROCESS. See **Constitutional Law,** II; **Procedure,** 7.

DUFFEL BAG. See **Constitutional Law,** VI, 6; XII, 1; **Evidence,** 3; **Procedure,** 11; **Trials.**

DUTY OF FAIR REPRESENTATION. See **National Labor Relations Act,** 1, 3.

EAVESDROPPING. See **Constitutional Law,** VI, 1-3, 7-8; **Evidence,** 1-2; **Procedure,** 4.

ECONOMIC POWER. See **Antitrust Acts,** 4-6.

EDUCATION LEAVES. See **Taxes,** 2.

ELECTIONS. See also **Constitutional Law,** I, 1-3; III, 2-3; VIII; **Contempt; Declaratory Judgments,** 1-2; **Mootness; National Labor Relations Board; Voting Rights Act of 1965.**

1. *Congressional redistricting statutes—Time.*—In view of ample time remaining to promulgate a constitutional redistricting plan prior to the 1970 election, the District Court's judgment is reversed insofar as it approved New York's plan for the 1970 election. Wells v. Rockefeller, p. 542.

2. *Equal protection of the laws—Disqualification of candidates in Alabama election.*—Disqualification of National Democratic Party of Alabama candidates on ground they failed to meet requirements of state law which their opponents did not have to meet constituted a violation of the Equal Protection Clause of the Fourteenth Amendment, and the case is remanded to the District Court for order that prevailing NDPA candidates in Etowah, Marengo, and Sumter Counties be treated as elected, and that a new election be held in Greene County for offices contested by NDPA candidates, whose names shall be on the ballots. Hadnott v. Amos, p. 358.

ELECTORS. See **Constitutional Law,** III, 1.

ELECTRONIC SURVEILLANCE. See **Constitutional Law,** VI, 1-3, 7; **Evidence,** 2; **Procedure,** 4.

ELIGIBLE VOTERS. See **Constitutional Law,** I, 1-3; **Elections,** 1.

EMPLOYER AND EMPLOYEES. See **Admiralty; Federal-State Relations; Longshoremen's and Harbor Workers' Compensation Act; National Labor Relations Act,** 1-3; **National Labor Relations Board; Railway Labor Act,** 1-2; **Taxes,** 2.

EQUALITY OF POPULATION. See **Constitutional Law,** I, 1-3; **Elections,** 1.

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** III; **Contempt; Elections,** 2; **Mootness; Voting Rights Act of 1965.**

EROSION. See **Judicial Review; Submerged Lands Act of 1953,** 1-3.

ERRORS OF LAW. See **Post-Conviction Relief; Procedure,** 5, 9-10.

EVIDENCE. See also **Antitrust Acts,** 1; **Constitutional Law,** II, 1–2; V, 1; VI, 2–8; XI; XII, 1; **Habeas Corpus,** 1–2; **Jurisdiction; National Labor Relations Board; Post-Conviction Relief; Procedure,** 1, 5–6, 9–12; **Trials.**

1. *Admissibility—Wiretapping—Prospectivity.*—Evidence obtained by wiretapping conducted in 1964 pursuant to warrant issued under N. Y. Code Crim. Proc. § 813–a is admissible in state criminal trial, since wiretapping occurred before (1) *Katz* v. *United States,* 389 U. S. 347, overruled prior decisions that the Fourth Amendment encompassed seizures of speech only if there was a trespass or physical intrusion of the speaker's constitutionally protected area, and (2) *Lee* v. *Florida,* 392 U. S. 378, extended the rule excluding evidence violative of § 605 of the Federal Communications Act; and both *Katz* v. *United States* and *Lee* v. *Florida* have been held to apply prospectively only. Kaiser v. New York, p. 280.

2. *Electronic surveillance — Disclosure by Government.* — If the surveillance is found to have been unlawful, and if petitioner is found to have standing, the Government must disclose to him the records of those overheard conversations which the Government was not entitled to use in building its case against him. Alderman v. United States, p. 165.

3. *Prosecutor's statement—Instructions to jury.*—On facts here, where evidence which prosecutor reasonably expected to produce (testimony of co-indictee who pleaded guilty but refused to testify) was objectively and briefly summarized and was not touted to jury as crucial to prosecution's case, court's limiting instructions were sufficient to protect petitioner's constitutional rights. Frazier v. Cupp, p. 731.

EVIDENTIARY HEARINGS. See **Habeas Corpus,** 1–2; **Procedure,** 6.

EXCLUSIONS FROM INCOME. See **Taxes,** 2.

EXCLUSIVE REMEDY. See **Admiralty; Longshoremen's and Harbor Workers' Compensation Act.**

EXCUSED FOR CAUSE. See **Constitutional Law,** XII, 2; **Juries.**

EXEMPTIONS. See **Taxes,** 2.

EXTENSION OF CREDIT. See **Antitrust Acts,** 3–5.

EYEWITNESS IDENTIFICATION. See **Constitutional Law,** II, 2; **Procedure,** 7.

FACTUAL BASIS FOR PLEA. See **Federal Rules of Criminal Procedure,** 2–3.

FAILING COMPANY DOCTRINE. See **Antitrust Acts,** 2, 6.

FEDERAL COMMUNICATIONS ACT. See **Constitutional Law,** VI, 8; **Evidence,** 1.

FEDERAL COURTS. See **Jurisdiction,** 2-3.

FEDERAL FOOD, DRUG, AND COSMETIC ACT.

Antibiotic sensitivity disc—Drug or device.—Antibiotic sensitivity disc used as laboratory screening test to help determine proper antibiotic drug to administer to patients is not merely "device" but "drug" within definition of § 201 (g)(1)(B) of the Act and thus subject to pre-market clearance regulations issued pursuant to § 507 of the Act. United States v. Bacto-Unidisk, p. 784.

FEDERAL PRISONERS. See **Post-Conviction Relief; Procedure,** 5, 9-10.

FEDERAL QUESTIONS. See **Constitutional Law,** VII, 1; **Jurisdiction,** 1, 4.

FEDERAL RULES OF CIVIL PROCEDURE. See **Habeas Corpus,** 1-2; **Intervention; Jurisdiction,** 3; **Procedure,** 2, 6.

FEDERAL RULES OF CRIMINAL PROCEDURE.

1. *Presentence report—When read by trial judge—Prejudice to petitioner.*—Petitioner's contention that his conviction should be reversed because trial judge read presentence report before jury returned its verdict, in violation of Rule 32, is rejected, as there is no evidence that trial judge read report before verdict was delivered. There was no prejudice to petitioner's rights, since even if judge read the report after the jury retired, he could not have affected the jury prior to verdict, the sentence was mandatory, and the information in the report had been revealed to the judge in an earlier psychiatric report. Gregg v. United States, p. 489.

2. *Rule 11—Guilty pleas—Prospectivity of decision.*—This Court's decision in *McCarthy* v. *United States, ante,* p. 459, holding that a defendant whose guilty plea is accepted in violation of Rule 11 must be afforded an opportunity to plead anew, is to be applied prospectively from the date of that decision. Halliday v. United States, p. 831.

3. *Rule 11—Judge's direct inquiry of defendant—Voluntariness of plea.*—Rule 11 requires the district judge to inquire directly of defendant pleading guilty whether defendant understands nature of the charge and is aware of consequences of his plea; and noncompliance with Rule 11 requires that guilty plea be set aside and that defendant's case be remanded for another hearing at which he may plead anew. McCarthy v. United States, p. 459.

FEDERAL-STATE RELATIONS. See also **Constitutional Law,** I, 1-3; II, 2; III, 3-4; IV; VI, 8; X; **Elections,** 1; **Evidence,** 1; **Grand Juries; Intervention; Judicial Review; Jurisdiction,** 2, 4; **Mootness; National Labor Relations Act; Procedure,** 2-3, 8; **Railway Labor Act,** 1-2; **Submerged Lands Act of 1953,** 1-3.

Railway Labor Act—Railway labor picketing.—Congress has not provided usable standards or access to administrative expertise in this area of railway labor conduct and the least unsatisfactory judicial solution is to allow those who have unsuccessfully exhausted the Act's procedures for resolving major disputes to employ their full range of peaceful economic power, provided it does not conflict with any other obligation imposed by federal law. Therefore, until Congress acts, primary or secondary railway labor picketing must be deemed conduct protected against state proscription. Railroad Trainmen v. Terminal Co., p. 369.

FELLOWSHIP PROGRAMS. See **Taxes,** 2.

FIFTH AMENDMENT. See **Constitutional Law,** III, 4; IV; VI, 6; X; XI; XII, 1; **Evidence,** 3; **Procedure,** 11; **Trials.**

FILMS. See **Constitutional Law,** V, 2; **Obscenity.**

FINALITY OF LITIGATION. See **Post-Conviction Relief; Procedure,** 5, 9-10.

FINANCE COMMITTEES. See **Constitutional Law,** III, 2; **Elections,** 2; **Voting Rights Act of 1965.**

FINANCING. See **Antitrust Acts,** 3-5.

FINES. See **National Labor Relations Act,** 1, 3.

FINGERPRINTS. See **Constitutional Law,** VI, 4-5.

FIRST AMENDMENT. See **Antitrust Acts,** 2, 6; **Constitutional Law,** V; VII-IX; **Declaratory Judgments,** 1-2; **Jurisdiction,** 1; **Obscenity; Statutory Construction.**

FLAG BURNING. See **Constitutional Law,** VII, 1; **Jurisdiction,** 1.

FLORIDA EAST COAST RAILWAY. See **Federal-State Relations; National Labor Relations Act,** 2; **Railway Labor Act,** 1-2.

FOOD AND DRUGS. See **Federal Food, Drug, and Cosmetic Act.**

FOREIGN CORPORATIONS. See **Jurisdiction,** 2.

FOURTEENTH AMENDMENT. See **Constitutional Law,** II-V; VI, 4-6, 8; X-XII; **Contempt; Declaratory Judgments,** 1-2; **Elections,** 2; **Evidence; Juries; Jurisdiction,** 1; **Mootness; Obscenity; Procedure,** 11; **Statutory Construction; Trials; Voting Rights Act of 1965.**

FOURTH AMENDMENT. See **Constitutional Law,** VI; **Evidence,** 1-3; **Habeas Corpus,** 1-2; **Post-Conviction Relief; Procedure,** 4-6, 9-12; **Trials.**

FREEDOM OF EXPRESSION. See **Constitutional Law,** V; VII-IX; **Statutory Construction.**

FREEDOM OF SPEECH. See **Constitutional Law,** V, 1; VII-VIII; **Declaratory Judgments,** 1-2; **Jurisdiction,** 1.

FREEDOM OF SPEECH AND PRESS. See **Constitutional Law,** V, 2; VIII; **Obscenity.**

FREEDOM OF THE PRESS. See **Antitrust Acts,** 2, 6; **Constitutional Law,** IX.

FREEDOM TO TRAVEL. See **Constitutional Law,** X.

GARRETT ACT. See **Constitutional Law,** III, 2; **Elections,** 2; **Voting Rights Act of 1965.**

GAS PRODUCERS. See **Taxes,** 1.

GEOGRAPHICAL COMPACTNESS. See **Constitutional Law,** I, 1-3.

GEORGIA. See **Constitutional Law,** V, 2; **Obscenity.**

GOOD-FAITH EFFORT. See **Constitutional Law,** I, 1-3; **Elections,** 1.

GOVERNMENTAL INTRUSIONS. See **Constitutional Law,** V, 2; **Obscenity.**

GRAIN TANKS. See **Admiralty; Longshoremen's and Harbor Workers' Compensation Act.**

GRAND JURIES. See also **Procedure,** 3.

Discrimination in jury selection—Injunction to prevent grand jury from considering criminal charges.—District Court did not abuse its discretion in refusing to enjoin grand jury proceedings, where injunction was sought on ground that Negroes had been systematically excluded from grand jury and District Court found that grand jury was illegally constituted. Bokulich v. Jury Commission, p. 97.

GRAVE MARKERS. See **Antitrust Acts,** 1; **Procedure,** 1.

GREAT SALT LAKE. See **Intervention; Procedure,** 2.

GREENE COUNTY. See **Constitutional Law,** III, 2; **Contempt; Elections,** 2; **Grand Juries; Procedure,** 3; **Voting Rights Act of 1965.**

GROSS INCOME. See **Taxes,** 1.

GUILTY PLEAS. See **Federal Rules of Criminal Procedure,** 2-3.

GULF OF MEXICO. See **Judicial Review; Submerged Lands Act of 1953,** 1-3.

HABEAS CORPUS. See also **Constitutional Law,** VI, 6; XII; **Evidence,** 3; **Post-Conviction Relief; Procedure,** 5-6, 9-11; **Trials.**

1. *Evidentiary hearings—Power of inquiry.*—Federal courts upon an appropriate showing must grant evidentiary hearings to petitioners for writs of habeas corpus and "the power of inquiry on federal habeas corpus is plenary." Harris v. Nelson, p. 286.

2. *Interrogatories — Discovery — Procedures available.*—Although § 2246 of Title 28, U. S. C. does not authorize interrogatories in habeas corpus proceedings except in limited circumstances not applicable here, a district court considering a petition for habeas corpus is free to use or authorize interrogatories or suitable discovery procedures reasonably fashioned to elicit facts to help the court "dispose of the matter as law and justice require." Harris v. Nelson, p. 286.

HAITIAN CORPORATION. See **Jurisdiction,** 2.

HANDBILLS. See **Constitutional Law,** VIII; **Declaratory Judgments,** 1-2.

HARMLESS ERROR. See **Constitutional Law,** II, 2; **Procedure,** 7.

HEADLANDS. See **Submerged Lands Act of 1953,** 1-2.

HEARINGS. See **Habeas Corpus,** 1-2; **Procedure,** 6.

HISTORIC TITLE. See **Judicial Review; Submerged Lands Act of 1953,** 1-2.

HOMEOWNER. See **Constitutional Law,** VI, 2-3, 7; **Evidence,** 2.

HOMOGENEOUS REGIONS. See **Constitutional Law,** I, 3; **Elections,** 1.

HOUSES. See **Antitrust Acts,** 3-5.

IDENTIFICATION. See **Constitutional Law,** II, 2; **Procedure,** 7.

ILLEGALITY PER SE. See **Antitrust Acts,** 2-6.

ILLINOIS. See **Admiralty; Constitutional Law,** III, 1, 3; **Longshoremen's and Harbor Workers' Compensation Act; Mootness.**

IMMUNITY. See **Intervention; Procedure,** 2.

IN CAMERA INSPECTION. See **Constitutional Law,** VI, 2-3, 7; **Evidence,** 2; **Procedure,** 12.

INCOME TAXES. See **Federal Rules of Criminal Procedure,** 3; **Procedure,** 12; **Taxes,** 1–2.

IN-CUSTODY INTERROGATION. See **Constitutional Law,** XI.

INDEMNIFICATION. See **Admiralty; Longshoremen's and Harbor Workers' Compensation Act.**

INDENTATIONS. See **Submerged Lands Act of 1953,** 1–2.

INDEPENDENT CANDIDATES. See **Constitutional Law,** III, 2–3; **Contempt; Elections; Mootness; Voting Rights Act of 1965.**

INDIGENTS. See **Constitutional Law,** III, 4; IV; X.

INFORMERS. See **Habeas Corpus,** 1–2; **Procedure,** 6.

INJUNCTIONS. See **Constitutional Law,** III, 2; **Contempt; Elections,** 2; **Federal-State Relations; Grand Juries; National Labor Relations Act,** 2; **Procedure,** 3; **Railway Labor Act,** 1–2; **Voting Rights Act of 1965.**

INLAND WATER LINE. See **Submerged Lands Act of 1953,** 1–2.

INLAND WATERS. See **Judicial Review; Submerged Lands Act of 1953,** 1–2.

INMATES. See **Constitutional Law,** III, 1.

INSANITY. See **Post-Conviction Relief; Procedure,** 5, 9–10.

INSPECTION. See **Constitutional Law,** VI, 2–3, 7; **Evidence,** 2.

INSTALLATION FEES. See **Antitrust Acts,** 1; **Procedure,** 1.

INSTRUCTIONS TO JURY. See **Constitutional Law,** VI, 6; XII, 1; **Evidence,** 3; **Procedure,** 11; **Trials.**

INTENT. See **Antitrust Acts,** 1; **Procedure,** 1.

INTERNAL REVENUE CODE. See **Taxes,** 1–2.

INTERROGATIONS. See **Constitutional Law,** VI, 6; XII, 1; **Evidence,** 3; **Procedure,** 11; **Trials.**

INTERROGATORIES. See **Habeas Corpus,** 1–2; **Procedure,** 6.

INTERSTATE COMMERCE. See **Antitrust Acts,** 3–5.

INTERSTATE MOVEMENT. See **Constitutional Law,** III, 4; IV; X.

INTERVENTION. See also **Procedure,** 2.

Great Salt Lake ownership—Stipulation limiting issues between Utah and the United States—Private claimants.—Special Master's Report will be placed on file and his denial of intervention to Morton International, Inc., a claimant to part of the property in this

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dispute between Utah and the United States over the ownership of the Great Salt Lake, is approved, since a Stipulation entered into between Utah and the United States has so limited the issues that the presence of Morton and other private claimants is not necessary or appropriate. Utah v. United States, p. 89.

INVESTIGATIONS. See **Constitutional Law,** VI, 4–5; **Procedure,** 8.

INVOLUNTARY CONFESSIONS. See **Constitutional Law,** VI, 6; XII, 1; **Evidence,** 3; **Procedure,** 11; **Trials.**

IRREPARABLE INJURY. See **Procedure,** 8.

ISLANDS. See **Judicial Review; Submerged Lands Act of 1953,** 1–2.

JOB RETENTION. See **National Labor Relations Act,** 1, 3.

JOINT OPERATING AGREEMENT. See **Antitrust Acts,** 2, 6; **Constitutional Law,** IX.

JUDGES. See **Constitutional Law,** VI, 2–3, 7; **Evidence,** 2; **Federal Rules of Criminal Procedure,** 1, 3; **Procedure,** 12.

JUDICIAL CONSTRUCTION. See **Constitutional Law,** V, 3–4; **Statutory Construction.**

JUDICIALLY INCAPACITATED VOTERS. See **Constitutional Law,** III, 1.

JUDICIAL REVIEW. See also **Jurisdiction,** 4; **Submerged Lands Act of 1953,** 1–2.

Straight baselines—United States' discretion—Submerged lands.—Fringes or chains of islands are treated same as other islands and are not taken into account as enclosing inland waters unless under Article 4 of the Convention on the Territorial Sea and the Contiguous Zone the coastal nation decides in the conduct of its international affairs to draw straight baselines joining appropriate points. The United States within its discretion has decided not to draw straight baselines along the Louisiana coast, and this exercise of discretion is not appropriately subject to review by the Court. Louisiana Boundary Case, p. 11.

JURIES. See also **Antitrust Acts,** 1; **Constitutional Law,** VI, 6; XII, 1–2; **Evidence,** 3; **Grand Juries; Procedure,** 1, 3; **Trials.**

Death penalty—Veniremen opposed to capital punishment.—Since several veniremen were excused for cause apparently because they voiced general objections to the death penalty, it appears that the sentence of death cannot constitutionally stand under *Wither-*

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spoon v. *Illinois,* 391 U. S. 510, and the cause is remanded to the District Court where this belated issue may be fully considered. Boulden v. Holman, p. 478.

JURISDICTION. See also **Constitutional Law,** VII, 1; **Federal-State Relations; National Labor Relations Act,** 2; **Railway Labor Act,** 1–2.

1. *Appeals—Federal question—Adequately raised.*—Appellant has met burden of showing federal question of constitutionality of "words" part of New York statute, which makes it a crime publicly to mutilate or "publicly [to] defy . . . or cast contempt upon [any American flag] whether by words or act," was adequately raised in state courts, by appellant's motion to dismiss in trial court and his briefs in appellate courts. Street v. New York, p. 576.

2. *Diversity actions—Assignment by alien corporation—Texas law.*—The assignment from an alien corporation to a Texas attorney was "improperly or collusively made" within the meaning of 28 U. S. C. § 1359, as the "manufacture of Federal jurisdiction" was the very thing Congress intended to prevent by the enactment of § 1359. The validity of the assignment under Texas law does not render it valid for purposes of federal jurisdiction; and § 1359 applies to diversity jurisdiction arising from the alienage of a party as well as that based on residence in different States. Kramer v. Caribbean Mills, p. 823.

3. *Federal diversity actions—Aggregation of claims.*—Separate and distinct claims presented by and for various claimants in federal diversity actions may not be added together to provide the requisite $10,000 jurisdictional amount in controversy. Snyder v. Harris, p. 332.

4. *Supreme Court — Louisiana statute — Federal question not raised in state court.*—Since petitioner's contention that Louisiana statute requiring that confessions be admitted into evidence in their entirety is unconstitutional, the sole federal question argued in this Court, was not raised, preserved, or passed on in the state courts, the writ of certiorari is dismissed for want of jurisdiction, as this Court will not decide federal questions raised here for the first time on review of state court decisions. Cardinale v. Louisiana, p. 437.

JURY'S VERDICT. See **Federal Rules of Criminal Procedure,** 1.

JUSTIFICATION. See **Constitutional Law,** I, 1–3; **Elections,** 1.

KENTUCKY UN-AMERICAN ACTIVITIES COMMITTEE. See **Procedure,** 8.

LABOR. See **National Labor Relations Board.**

LABORATORIES. See **Taxes,** 2.

LABORATORY TESTS. See **Federal Food, Drug, and Cosmetic Act.**

LABOR DISPUTES. See **Federal-State Relations; National Labor Relations Act,** 2; **Railway Labor Act,** 1–2.

LABOR MANAGEMENT RELATIONS ACT. See **Federal-State Relations; National Labor Relations Act,** 2; **Railway Labor Act,** 1–2.

LABOR POLICY. See **National Labor Relations Act,** 1, 3.

LAKE BOTTOM. See **Intervention; Procedure,** 2.

LAND DEVELOPMENT. See **Antitrust Acts,** 3–5.

LARCENY. See **Grand Juries; Procedure,** 3.

LAWYERS. See **Constitutional Law,** II, 2; VI, 6; XI; XII, 1.

LEGISLATURES. See **Constitutional Law,** III, 1.

LESSER INCLUDED OFFENSES. See **Federal Rules of Criminal Procedure,** 3.

LIABILITY. See **Admiralty; Longshoremen's and Harbor Workers' Compensation Act.**

LIMITATION OF ISSUES. See **Intervention; Procedure,** 2.

LINEUPS. See **Constitutional Law,** II, 2; **Procedure,** 7.

LIST OF EMPLOYEES. See **National Labor Relations Board.**

LOANS. See **Antitrust Acts,** 3–5.

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT. See also **Admiralty.**

Death of longshoreman—Employer's remedy against third persons—Subrogation.—Nothing on the face of § 33 of the Act or in the Act's legislative history limits the employer's remedy against third persons to subrogation to the rights of the deceased employee's representative. Marine Terminals v. Shipping Co., p. 404.

LOUISIANA. See **Judicial Review; Jurisdiction,** 4; **Submerged Lands Act of 1953,** 1–2.

LOUISVILLE. See **Antitrust Acts,** 3–5.

LOW-TIDE ELEVATIONS. See **Submerged Lands Act of 1953,** 1–2.

MAJOR DISPUTES. See **Federal-State Relations; National Labor Relations Act,** 2; **Railway Labor Act,** 1–2.

MALICIOUS MISCHIEF. See **Constitutional Law,** VII, 1; **Jurisdiction,** 1.

MARCHES. See **Constitutional Law,** V, 3–4; **Statutory Construction.**

MARITIME LAW. See **Admiralty; Longshoremen's and Harbor Workers' Compensation Act.**

MARKET CONTROL. See **Antitrust Acts,** 2, 6.

MARKET DOMINANCE. See **Antitrust Acts,** 3–5.

MASS MEETINGS. See **Constitutional Law,** III, 2; **Elections,** 2; **Voting Rights Act of 1965.**

MATHEMATICAL EQUALITY. See **Constitutional Law,** I, 1–3; **Elections,** 1.

MATTER IN CONTROVERSY. See **Jurisdiction,** 3.

MERCHANT SHIPS. See **Admiralty; Longshoremen's and Harbor Workers' Compensation Act.**

MIGRANTS. See **Constitutional Law,** III, 4; IV; X.

MILITARY SERVICE. See **Constitutional Law,** VII, 2.

MINIMUM PRICE ORDERS. See **Taxes,** 1.

MIRANDA WARNINGS. See **Constitutional Law,** XI.

MISSISSIPPI. See **Constitutional Law,** VI, 4–5.

MISSISSIPPI RIVER DELTA. See **Submerged Lands Act of 1953,** 1–2.

MISSOURI. See **Constitutional Law,** I, 1–2.

MONOPOLY. See **Antitrust Acts,** 1–6; **Constitutional Law,** IX; **Procedure,** 1.

MOOTNESS. See also **Constitutional Law,** III, 3; VII, 1; **Jurisdiction,** 1.

Presidential electors—Nominating petitions—Future elections.—This case is not moot, even though the 1968 elections are history, as the burden which *MacDougall* v. *Green,* 335 U. S. 281, placed on nominations for statewide offices controls future elections, and reflects a continuing federal-state controversy which needs resolution. Moore v. Ogilvie, p. 814.

MOTION TO DISMISS. See **Procedure,** 8.

MOTION TO VACATE SENTENCE. See **Post-Conviction Relief; Procedure,** 5, 9–10.

MOTIVE. See **Antitrust Acts,** 1; **Procedure,** 1.

MUD CLUMPS. See **Judicial Review; Submerged Lands Act of 1953,** 1-2.

MUNICIPAL ORDINANCES. See **Constitutional Law,** V, 3-4; **Statutory Construction.**

MURDER. See **Constitutional Law,** VI, 6; XI; XII, 1; **Evidence,** 3; **Procedure,** 11; **Trials.**

MURDEROUS THREATS. See **Constitutional Law,** VI, 2-3, 7; **Evidence,** 2.

NATIONAL DEMOCRATIC PARTY OF ALABAMA. See **Constitutional Law,** III, 2; **Contempt; Elections,** 2; **Voting Rights Act of 1965.**

NATIONAL LABOR RELATIONS ACT. See also **Certiorari; Federal-State Relations; Railway Labor Act,** 1-2.

1. *Labor policy—Union rule.*—Arguments that union rule here contravened statutory labor policy were inadequate. Rule did not impede collective bargaining process, cause breach of collective bargaining agreement, establish featherbedding within meaning of statute, induce discrimination by employer against any class of employees, or represent dereliction by union of duty of fair representation, and in view of acceptable manner of enforcement by reasonable fines to vindicate proper union concern it does not constitute restraint or coercion prohibited by § 8 (b)(1)(A). Scofield v. NLRB, p. 423.

2. *Primary jurisdiction—Railway labor dispute.*—Jurisdiction of state courts was not pre-empted by primary jurisdiction of National Labor Relations Board, even though small percentage of petitioner unions' membership may be subject to National Labor Relations Act, as this is simply a railway labor dispute to which that Act has no direct application. Railroad Trainmen v. Terminal Co., p. 369.

3. *Union rule—Legitimate union interest.*—Section 8 (b)(1) of the Act permits a union to enforce properly adopted rule which reflects a legitimate union interest, impairs no statutory labor policy, and is reasonably enforced against union members who are free to leave the union and escape the rule, while maintaining job security under union shop clause by paying dues. Scofield v. NLRB, p. 423.

NATIONAL LABOR RELATIONS BOARD.

Representation election—List of employees—Order to produce.—The judgment of the Court of Appeals is reversed and the case is remanded to the District Court with directions to reinstate its judgment which upheld the NLRB's order directing respondent to provide a list of its employees, or records showing employees' names and addresses, in connection with a representation election among respondent's employees. NLRB v. Wyman-Gordon Co., p. 759.

NATIONAL SECURITY VIOLATIONS. See **Constitutional Law,** VI, 2–3, 7; **Evidence,** 2.

NATURAL GAS. See **Taxes,** 1.

NAVIGATION RULES. See **Submerged Lands Act of 1953,** 1–2.

NEEDY PERSONS. See **Constitutional Law,** III, 4; IV; X.

NEGLIGENCE. See **Admiralty; Longshoremen's and Harbor Workers' Compensation Act.**

NEGROES. See **Constitutional Law,** V, 3–4; **Contempt; Elections,** 2; **Grand Juries; Procedure,** 3; **Statutory Construction; Voting Rights Act of 1965.**

NEWSPAPERS. See **Antitrust Acts,** 2, 6; **Constitutional Law,** IX.

NEW YORK. See **Constitutional Law,** I, 1, 3; VII, 1; VIII; **Declaratory Judgments,** 1–2; **Elections,** 1; **Jurisdiction,** 1.

NOMINATING PETITIONS. See **Constitutional Law,** III, 3; **Mootness.**

NOMINATIONS. See **Constitutional Law,** III, 2–3; **Contempt; Elections,** 2; **Voting Rights Act of 1965.**

NORRIS-LA GUARDIA ACT. See **Federal-State Relations; National Labor Relations Act,** 2; **Railway Labor Act,** 1–2.

OBSCENITY. See also **Constitutional Law,** V, 2.

Obscene films—First Amendment—Private possession.—The First Amendment as made applicable to the States by the Fourteenth prohibits making mere private possession of obscene material a crime. The Constitution protects the right to receive information and ideas, regardless of their social worth, and to be generally free from governmental intrusions into one's privacy and control of one's thoughts. Stanley v. Georgia, p. 557.

ONE-YEAR WAITING PERIOD. See **Constitutional Law,** III, 4; IV; X.

OPENING STATEMENT. See **Constitutional Law,** VI, 6; XII, 1; **Evidence,** 3; **Procedure,** 11; **Trials.**

OPINIONS. See **Certiorari.**

ORDINANCES. See **Constitutional Law,** V, 3–4; **Statutory Construction.**

OVERBREADTH. See **Constitutional Law,** VI, 8; **Evidence,** 1.

OVERCHARGES. See **Taxes,** 1.

OVERHEARD CONVERSATIONS. See **Constitutional Law,** VI, 2–3, 7; **Evidence,** 2.

OWNERSHIP OF LAKE BED. See **Intervention; Procedure,** 2.

PANAMANIAN CORPORATION. See **Jurisdiction,** 2.

PARADE PERMITS. See **Constitutional Law,** V, 3–4; **Statutory Construction.**

PEACEFUL PICKETING. See **Federal-State Relations; National Labor Relations Act,** 2; **Railway Labor Act,** 1–2.

PENNSYLVANIA. See **Constitutional Law,** III, 4; IV; X.

PERMANENT HARBOR WORKS. See **Submerged Lands Act of 1953,** 1–2.

PERMITS. See **Constitutional Law,** V, 3–4; **Statutory Construction.**

PHYSICAL INTRUSION. See **Constitutional Law,** VI, 1–3, 7–8; **Evidence,** 1; **Procedure,** 4.

PICKETING. See **Constitutional Law,** V, 3–4; **Federal-State Relations; National Labor Relations Act,** 2; **Railway Labor Act,** 1–2; **Statutory Construction.**

PIECEWORK. See **Certiorari; National Labor Relations Act,** 1, 3.

PIMA COUNTY. See **Antitrust Acts,** 2, 6; **Constitutional Law,** IX.

PLEAS. See **Federal Rules of Criminal Procedure,** 2–3.

POLICE CUSTODY. See **Constitutional Law,** XI.

POLICE INTERROGATIONS. See **Constitutional Law,** VI, 6; XI; XII, 1; **Evidence,** 3; **Procedure,** 11; **Trials.**

POLICE ORDERS. See **Constitutional Law,** II, 1; V, 1.

POLICE STATION LINEUPS. See **Constitutional Law,** II, 2; **Procedure,** 7.

POLITICAL HYPERBOLE. See **Constitutional Law,** VII, 2.

POLITICAL LITERATURE. See **Constitutional Law,** VIII; **Declaratory Judgments,** 1–2.

POPULATION SHIFTS. See **Constitutional Law,** I, 1–3.

POPULATION VARIANCES. See **Constitutional Law,** I, 1–3; **Elections,** 1.

POSSESSION OF OBSCENE MATTER. See **Constitutional Law,** V, 2; **Obscenity.**

POST-CONVICTION RELIEF. See also **Procedure,** 5, 9–10.

Federal prisoner—Motion to vacate sentence.—A claim of unconstitutional search and seizure is cognizable under 28 U. S. C. § 2255 (motion to vacate sentence). Post-conviction relief for prisoners' *constitutional* claims is not limited by the rule that collateral review is not available to correct errors of law. Kaufman v. United States, p. 217.

POST OFFICE ROBBERY. See **Federal Rules of Criminal Procedure,** 1.

PRE-EMPTION. See **Federal-State Relations; National Labor Relations Act,** 2; **Railway Labor Act,** 1–2.

PREFABRICATED HOUSES. See **Antitrust Acts,** 3–5.

PRE-MARKET CLEARANCE. See **Federal Food, Drug, and Cosmetic Act.**

PRESENTENCE REPORTS. See **Federal Rules of Criminal Procedure,** 1.

PRESIDENT. See **Constitutional Law,** VII, 2.

PRESIDENTIAL ELECTORS. See **Constitutional Law,** III, 3; **Mootness.**

PRETRIAL DISCOVERY. See **Antitrust Acts,** 1; **Procedure,** 1.

PRICE-FIXING. See **Antitrust Acts,** 2, 6.

PRIMARIES. See **Constitutional Law,** III, 2; **Contempt; Elections,** 2; **Voting Rights Act of 1965.**

PRIMARY JURISDICTION. See **Federal-State Relations; National Labor Relations Act,** 2; **Railway Labor Act,** 1–2.

PRIMARY PICKETING. See **Federal-State Relations; National Labor Relations Act,** 2; **Railway Labor Act,** 1–2.

PRIOR RESTRAINTS. See **Constitutional Law,** V, 3–4; **Statutory Construction.**

PRISONERS. See **Constitutional Law,** III, 1; **Habeas Corpus,** 1–2; **Post-Conviction Relief; Procedure,** 5–6, 9–10.

PRIVACY. See **Constitutional Law,** V, 2; VI, 2–3, 7; **Evidence,** 2; **Obscenity.**

PRIVATE CLAIMANTS. See **Intervention; Procedure,** 2.

PRIVATE POSSESSION. See **Constitutional Law,** V, 2; **Obscenity.**

PROBABLE CAUSE. See **Constitutional Law,** VI, 1; **Procedure,** 4.

PROBATE JUDGES. See **Constitutional Law,** III, 2; **Contempt; Elections,** 2; **Voting Rights Act of 1965.**

PROCEDURE. See also **Admiralty; Antitrust Acts,** 1, 3–5; **Certiorari; Constitutional Law,** I, 1, 3; II, 2; VI, 8; VIII; XII, 2; **Contempt; Declaratory Judgments,** 1–2; **Elections,** 1; **Evidence,** 1; **Federal Rules of Criminal Procedure,** 1–3; **Grand Juries; Habeas Corpus,** 1–2; **Intervention; Juries; Jurisdiction,** 3–4; **Longshoremen's and Harbor Workers' Compensation Act; National Labor Relations Act,** 1, 3; **National Labor Relations Board; Post-Conviction Relief; Trials.**

1. *Antitrust suits—Summary judgment.*—The alleged conspiracy had not been conclusively disproved by pretrial discovery and there remained material issues of fact which could only be resolved by a jury after a plenary trial. "[S]ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles . . . ." Norfolk Monument v. Woodlawn, p. 700.

2. *Denial of intervention—Great Salt Lake ownership—Stipulation limiting issues.*—Special Master's Report will be placed on file and his denial of intervention to Morton International, Inc., a claimant to part of the property in this dispute between Utah and the United States over the ownership of the Great Salt Lake, is approved, since a Stipulation entered into between Utah and the United States has so limited the issues that the presence of Morton and other private claimants is not necessary or appropriate. Utah v. United States, p. 89.

3. *District Courts—Discrimination in jury selection—Injunction to prevent grand jury from considering criminal charges.*—District Court did not abuse its discretion in refusing to enjoin grand jury proceedings, where injunction was sought on ground that Negroes had been systematically excluded from grand jury and District Court found that grand jury was illegally constituted. Bokulich v. Jury Commission, p. 97.

4. *Electronic eavesdropping — Prospective application. — Katz* v. *United States,* 389 U. S. 347, which held that the reach of the Fourth Amendment "cannot turn upon the presence or absence of a physical intrusion into any given enclosure," and that every electronic eavesdropping upon private conversations is a search and seizure which, as a general rule, can comply with constitutional standards only when authorized by a magistrate on a showing of probable cause under precise limitations and safeguards, to the extent that it departed from previous holdings of the Court, is to be applied prospectively only. Desist v. United States, p. 244.

PROCEDURE—Continued.

5. *Finality of litigation — Federal prisoners — Post-conviction relief.*—Considerations of finality of litigation have no greater weight with respect to federal prisoners seeking relief under 28 U. S. C. § 2255 than with respect to state prisoners seeking habeas corpus relief. Kaufman v. United States, p. 217.

6. *Habeas corpus — Interrogatories — Procedures available to court.*—Although § 2246 of Title 28, U. S. C. does not authorize interrogatories in habeas corpus proceedings except in limited circumstances not applicable here, a district court considering a petition for habeas corpus is free to use or authorize interrogatories or suitable discovery procedures reasonably fashioned to elicit facts to help the court "dispose of the matter as law and justice require." Harris v. Nelson, p. 286.

7. *Harmless error — State court determination.* — Question of whether error (repeated confrontations between eyewitness to robbery and suspect) was harmless under *Chapman* v. *California,* 386 U. S. 18, should be determined in the first instance by the California courts. Foster v. California, p. 440.

8. *Injunctive and declaratory relief—Threatened investigations—Motion to dismiss.*—Dismissal of appellant organizations' suit for injunctive and declaratory relief against threatened investigations by Kentucky Un-American Activities Committee upheld as appellants failed to respond to motion to dismiss as required by local court rules and trial court could thus take conclusory allegations of irreparable injury as insubstantial and not justifying federal intervention. Black Unity League v. Miller, p. 100.

9. *Post-conviction relief — Federal prisoner — Motion to vacate sentence.*—A claim of unconstitutional search and seizure is cognizable under 28 U. S. C. § 2255 (motion to vacate sentence). Post-conviction relief for prisoners' *constitutional* claims is not limited by the rule that collateral review is not available to correct errors of law. Kaufman v. United States, p. 217.

10. *Post-conviction relief—Protection of constitutional rights.*—Federal post-conviction relief is available to both state and federal prisoners to protect constitutional rights relating to the criminal trial process, and the circumstances under which federal courts must review constitutional claims of federal prisoners under 28 U. S. C. § 2255 are the same as those requiring habeas corpus review of constitutional claims of state prisoners, except that a § 2255 court need not be concerned with the adequacy of the underlying federal rules of procedure. Kaufman v. United States, p. 217.

11. *Prosecutor's statement—Instructions to jury.*—On facts here, where evidence which prosecutor reasonably expected to produce

PROCEDURE—Continued.

(testimony of co-indictee who pleaded guilty but refused to testify) was objectively and briefly summarized and was not touted to jury as crucial to prosecution's case, court's limiting instructions were sufficient to protect petitioner's constitutional rights. Frazier v. Cupp, p. 731.

12. *Unlawful electronic surveillance—Disclosure by Government—In camera inspection by judge.*—*Alderman* v. *United States, ante,* p. 165, requires an adversary proceeding only where *in camera* procedures are inadequate to safeguard defendant's Fourth Amendment rights, but here where Government turned over all petitioner's overheard conversations and the District Court examined the records to ascertain if the Government had correctly identified petitioner's voice and had turned over all his conversations it cannot be said that "the task is too complex, and the margin of error too great, to rely wholly on the *in camera* judgment of the trial court." Taglianetti v. United States, p. 316.

PROCESSIONS. See **Constitutional Law,** V, 3-4; **Statutory Construction.**

PRODUCTION CEILINGS. See **Certiorari; National Labor Relations Act,** 1, 3.

PROFIT POOLING. See **Antitrust Acts,** 2, 6.

PROOF. See **Antitrust Acts,** 2, 6.

PROPERTY OWNERS. See **Intervention; Procedure,** 2.

PROSECUTION. See **Grand Juries; Procedure,** 3.

PROSECUTOR'S STATEMENT. See **Constitutional Law,** VI, 6; XII, 1; **Evidence,** 3; **Procedure,** 11; **Trials.**

PROSPECTIVITY. See **Constitutional Law,** VI, 1, 8; **Evidence,** 1; **Federal Rules of Criminal Procedure,** 2; **Procedure,** 4.

PROTESTS. See **Constitutional Law,** VII, 1; **Jurisdiction,** 1.

PSYCHIATRIC REPORT. See **Federal Rules of Criminal Procedure,** 1.

PUBLIC ASSISTANCE. See **Constitutional Law,** III, 4; IV; X.

PUNISHMENT. See **Constitutional Law,** XII, 2; **Juries.**

QUALIFICATIONS. See **Constitutional Law,** III, 2; **Contempt; Elections,** 2; **Voting Rights Act of 1965.**

QUID PRO QUO. See **Taxes,** 2.

RAILROAD TERMINALS. See **Federal-State Relations; National Labor Relations Act,** 2; **Railway Labor Act,** 1-2.

RAILWAY LABOR ACT. See also **Federal-State Relations; National Labor Relations Act,** 2.

1. *National Labor Relations Act—Peaceful primary picketing.*—National Labor Relations Act cannot be imported completely into railway labor area, but it can be referred to for assistance in construing the Railway Labor Act. Peaceful primary picketing incident to a lawful strike is protected conduct under the NLRA, and since there are no grounds for distinguishing picketing under the RLA, peaceful primary strikes and peaceful picketing incident thereto are within the core of protected self-help under the RLA. Railroad Trainmen v. Terminal Co., p. 369.

2. *Settlement of disputes—Resort to self-help—State courts.*—The Act supplies a detailed framework to facilitate voluntary settlement of major disputes, and while it does not specify what occurs when these procedures have been exhausted without success, it does imply the ultimate right of parties to resort to peaceful self-help; and while Florida courts may have jurisdiction over this litigation, application of state law is limited by paramount federal policies, as the Act's scheme for resolution of disputes would become meaningless if States could prohibit parties from engaging in *any* self-help. Railroad Trainmen v. Terminal Co., p. 369.

RAISED STRUCTURES. See **Submerged Lands Act of 1953,** 1–2.

RAPE. See **Constitutional Law,** VI, 4–5.

REAL PROPERTY. See **Intervention; Procedure,** 2.

REAPPORTIONMENT. See **Constitutional Law,** I, 1–3; **Elections,** 1.

RECEIVERSHIP. See **Antitrust Acts,** 2, 6.

RECORDINGS. See **Constitutional Law,** VI, 2–3, 7; **Evidence,** 2.

REDISTRICTING. See **Constitutional Law,** I, 1–3; **Elections,** 1.

REFUNDS. See **Taxes,** 1.

RELICTED LANDS. See **Intervention; Procedure,** 2.

RELIEF. See **Post-Conviction Relief; Procedure,** 5, 8–10.

RELIEF PAYMENTS. See **Constitutional Law,** III, 4; IV; X.

REMEDIES. See **Admiralty; Longshoremen's and Harbor Workers' Compensation Act.**

REORGANIZATION. See **Antitrust Acts,** 2, 6.

REPAYMENTS. See **Taxes,** 1.

REPRESENTATION ELECTIONS. See **National Labor Relations Board.**

RESERVED GATES. See **Federal-State Relations; National Labor Relations Act,** 2; **Railway Labor Act,** 1–2.

RESIDENCE. See **Constitutional Law,** III, 1, 3; **Mootness.**

RESIDENCE REQUIREMENTS. See **Constitutional Law,** III, 4; IV; X.

RESTRAINING ORDERS. See **Constitutional Law,** III, 2; **Contempt; Elections,** 2; **Voting Rights Act of 1965.**

RESTRAINT OF TRADE. See **Antitrust Acts,** 1–6; **Procedure,** 1.

RETROACTIVITY. See **Constitutional Law,** VI, 1, 8; **Evidence,** 1; **Federal Rules of Criminal Procedure,** 2; **Procedure,** 4.

RIGHT TO COUNSEL. See **Constitutional Law,** VI, 6; XI; XII, 1; **Evidence,** 3; **Procedure,** 11; **Trials.**

RIGHT TO PLEAD ANEW. See **Federal Rules of Criminal Procedure,** 2–3.

RIGHT TO REMAIN SILENT. See **Constitutional Law,** XI.

ROBBERY. See **Constitutional Law,** II, 2; **Federal Rules of Criminal Procedure,** 1; **Procedure,** 7.

RULE-MAKING POWER. See **National Labor Relations Board.**

RULES OF CIVIL PROCEDURE. See **Habeas Corpus,** 1–2; **Intervention; Jurisdiction,** 3; **Procedure,** 2, 6.

RULES OF CRIMINAL PROCEDURE. See **Federal Rules of Criminal Procedure,** 1–3.

SAFE WORKING AREA. See **Admiralty; Longshoremen's and Harbor Workers' Compensation Act.**

SALES. See **Antitrust Acts,** 3–5.

SCHOLARSHIPS. See **Taxes,** 2.

SCREENING TESTS. See **Federal Food, Drug, and Cosmetic Act.**

SEARCH AND SEIZURE. See **Constitutional Law,** VI; **Evidence,** 1–3; **Habeas Corpus,** 1–2; **Post-Conviction Relief; Procedure,** 4–6, 9–12; **Trials.**

SEARCH WARRANTS. See **Constitutional Law,** V, 2; **Obscenity.**

SECONDARY BOYCOTTS. See **Federal-State Relations; National Labor Relations Act,** 2; **Railway Labor Act,** 1–2.

SECONDARY PICKETING. See **Federal-State Relations; National Labor Relations Act,** 2; **Railway Labor Act,** 1–2.

SELF-HELP. See **Federal-State Relations; National Labor Relations Act,** 2; **Railway Labor Act,** 1-2.

SELF-INCRIMINATION. See **Constitutional Law,** VI, 6; XI; XII, 1; **Evidence,** 3; **Procedure,** 11; **Trials.**

SEMI-CIRCLE TEST. See **Judicial Review; Submerged Lands Act of 1953,** 1-2.

SENSITIVITY DISCS. See **Federal Food, Drug, and Cosmetic Act.**

SENTENCE OF DEATH. See **Constitutional Law,** XII, 2; **Juries.**

SENTENCES. See **Post-Conviction Relief; Procedure,** 5, 9-10.

SENTENCING HEARINGS. See **Federal Rules of Criminal Procedure,** 3.

SHERMAN ACT. See **Antitrust Acts,** 1-6; **Constitutional Law,** IX; **Procedure,** 1.

SHIFTS OF POPULATION. See **Constitutional Law,** I, 1-3.

SHIPOWNER. See **Admiralty; Longshoremen's and Harbor Workers' Compensation Act.**

SHIPS. See **Admiralty; Longshoremen's and Harbor Workers' Compensation Act.**

SHOALS. See **Submerged Lands Act of 1953,** 1-2.

SIXTH AMENDMENT. See **Constitutional Law,** VI, 6; XII, 1-2; **Evidence,** 3; **Juries; Procedure,** 11; **Trials.**

SOCIAL SECURITY ACT. See **Constitutional Law,** III, 4; IV; X.

SOVEREIGN IMMUNITY. See **Intervention; Procedure,** 2.

SPECIAL MASTER. See **Intervention; Procedure,** 2; **Submerged Lands Act of 1953,** 1-2.

SPEECH. See **Constitutional Law,** VI, 8; VII, 1-2; VIII; **Evidence,** 1.

STANDING TO OBJECT. See **Constitutional Law,** VI, 2-3, 7; **Evidence,** 2.

STATE BOUNDARIES. See **Judicial Review; Submerged Lands Act of 1953,** 1-3.

STATE PRISONERS. See **Habeas Corpus,** 1-2; **Post-Conviction Relief; Procedure,** 5-6, 9-10.

STATE WELFARE PROGRAMS. See **Constitutional Law,** III, 4; IV; X.

STATUTORY CONSTRUCTION. See also **Constitutional Law, V, 3-4.**

Municipal ordinance — Narrow construction on appeal. — The narrow construction that the State Supreme Court placed on § 1159 of the Birmingham General Code in 1967 does not necessarily validate petitioner's 1963 conviction; the test is whether the ordinance was actually administered "so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." Shuttlesworth v. Birmingham, p. 147.

STEVEDORING CONTRACTOR. See **Admiralty; Longshoremen's and Harbor Workers' Compensation Act.**

STIPENDS. See **Taxes,** 2.

STIPULATIONS. See **Intervention; Procedure,** 2.

STRAIGHT BASELINES. See **Judicial Review; Submerged Lands Act of 1953,** 1-2.

STRIKES. See **Federal-State Relations; National Labor Relations Act,** 2; **Railway Labor Act,** 1-2.

STUDIES. See **Taxes,** 2.

SUBMERGED LANDS ACT OF 1953. See also **Judicial Review.**

1. *Louisiana's coastline—Convention on the Territorial Sea and the Contiguous Zone — Inland waters.* — That part of Louisiana's coastline which, under the Submerged Lands Act, consists of the "line marking the seaward limit of inland waters," is to be drawn in accordance with the Convention's definitions. Louisiana Boundary Case, p. 11.

2. *Louisiana's coastline—Particularized disputes—Special Master.*— Though the Court is able to decide many issues concerning the Louisiana coastline, it has decided to refer to a Special Master several particularized disputes over the precise boundary between submerged Gulf lands belonging to the United States and those belonging to Louisiana. Louisiana Boundary Case, p. 11.

3. *Texas' coastline—Three-league limit—Convention on the Territorial Sea and the Contiguous Zone.*—The Convention, whose definitions have been adopted by the Court for the purposes of the Submerged Lands Act, defines "coast line" as the modern, ambulatory coastline resulting from erosion and accretion, and it is from that line that Texas' gulfward boundary must be measured. Texas Boundary Case, p. 1.

SUBMISSION OF PRESENTENCE REPORT. See **Federal Rules of Criminal Procedure,** 1.

SUBPOENAS. See **National Labor Relations Board.**

SUBROGATION. See **Admiralty; Longshoremen's and Harbor Workers' Compensation Act.**

SUB-STATES. See **Constitutional Law,** I, 1, 3; **Elections,** 1.

SUGGESTIVENESS. See **Constitutional Law,** II, 2; **Procedure,** 7.

SUITS. See **Admiralty; Intervention; Longshoremen's and Harbor Workers' Compensation Act; Procedure,** 2.

SUMMARY JUDGMENT. See **Antitrust Acts,** 1; **Procedure,** 1.

SUPPRESSION OF EVIDENCE. See **Constitutional Law,** VI, 2–3, 7; **Evidence,** 2.

SUPREME COURT. See also **Contempt; Jurisdiction,** 4.

Assignment of Mr. Justice Clark (retired) to United States Court of Customs and Patent Appeals, p. 967.

SURVEILLANCE. See **Constitutional Law,** VI, 1–3, 7; **Evidence,** 2; **Procedure,** 4.

SUSPENSION FROM UNION. See **Certiorari; National Labor Relations Act,** 1, 3.

TANK OPENING. See **Admiralty; Longshoremen's and Harbor Workers' Compensation Act.**

TAXABLE YEARS. See **Taxes,** 1.

TAX CONTRIBUTIONS. See **Constitutional Law,** III, 4; IV; X.

TAXES. See also **Federal Rules of Criminal Procedure,** 3.

1. *Depletion allowance—Natural gas producers—Refunds.*—Under § 1341 of the Internal Revenue Code of 1954 the deduction allowable in the year of repayment must be reduced by the percentage depletion allowance granted respondent natural gas producer in the years of receipt as a result of the inclusion of the later-refunded items in respondent's "gross income from the property" in those years, since Congress did not intend to give taxpayers a deduction for refunding money which was not taxed when received. United States v. Skelly Oil Co., p. 678.

2. *Income taxes—Treasury regulations—Fellowship and scholarship programs.*—Treas. Reg. § 1.117–4 (c), which provides that amounts representing "compensation for . . . employment services" and amounts paid "to enable [an individual] to pursue studies . . . primarily for the benefit of the grantor," are not excludable as scholarships, is valid and the jury properly found that the amounts that respondents, Westinghouse employees, received under the company's Fellowship Program were not excludable "scholarships" but taxable "compensation." Bingler v. Johnson, p. 741.

TERMINALS. See **Federal-State Relations**; **National Labor Relations Act**, 2; **Railway Labor Act**, 1-2.

TERRITORIAL WATERS. See **Judicial Review**; **Submerged Lands Act of 1953**, 1-3.

TESTIMONY. See **Constitutional Law**, VI, 6; XII, 1; **Evidence**, 3; **Procedure**, 11; **Trials.**

TEXAS. See **Constitutional Law**, XI; **Jurisdiction**, 2; **Submerged Lands Act of 1953**, 3.

THREATENED INVESTIGATIONS. See **Procedure**, 8.

THREATS AGAINST PRESIDENT. See **Constitutional Law**, VII, 2.

THREE-LEAGUE LIMIT. See **Submerged Lands Act of 1953**, 3.

THREE-MILE LIMIT. See **Submerged Lands Act of 1953**, 1-2.

TIME. See **Constitutional Law**, I, 1, 3; **Elections**, 1.

TIME CHARTERER. See **Admiralty**; **Longshoremen's and Harbor Workers' Compensation Act.**

TIMELINESS OF PETITION. See **Certiorari.**

TORT ACTIONS. See **Admiralty**; **Longshoremen's and Harbor Workers' Compensation Act.**

TRAFFIC REGULATIONS. See **Constitutional Law**, V, 3-4; **Statutory Construction.**

TREASURY REGULATIONS. See **Taxes**, 2.

TREBLE-DAMAGE SUITS. See **Antitrust Acts**, 3-5.

TRESPASS. See **Constitutional Law**, VI, 8; **Evidence**, 1.

TRIALS. See also **Antitrust Acts**, 1; **Constitutional Law**, VI, 6; XII, 1; **Evidence**, 3; **Federal Rules of Criminal Procedure**, 1; **Procedure**, 1, 11.

Prosecutor's statement—Instructions to jury.—On facts here, where evidence which prosecutor reasonably expected to produce (testimony of co-indictee who pleaded guilty but refused to testify) was objectively and briefly summarized and was not touted to jury as crucial to prosecution's case, court's limiting instructions were sufficient to protect petitioner's constitutional rights. Frazier v. Cupp, p. 731.

TUCSON. See **Antitrust Acts**, 2, 6; **Constitutional Law**, IX.

TUITION EXPENSES. See **Taxes**, 2.

TYING ARRANGEMENTS. See **Antitrust Acts**, 3-5.

UNDERSTANDING OF CHARGE. See **Federal Rules of Criminal Procedure,** 3.

UNFAIR LABOR PRACTICE. See **Certiorari; National Labor Relations Act,** 1, 3.

UNION RULES. See **Certiorari; National Labor Relations Act,** 1, 3.

UNIONS. See **Certiorari; Federal-State Relations; National Labor Relations Act,** 1–3; **National Labor Relations Board; Railway Labor Act,** 1–2.

UNITED STATES STEEL CORP. See **Antitrust Acts,** 3–5.

UNLAWFUL DETENTION. See **Constitutional Law,** VI, 4–5.

UNRELIABLE INFORMANTS. See **Habeas Corpus,** 1–2; **Procedure,** 6.

UNSENTENCED INMATES. See **Constitutional Law,** III, 1.

UTAH. See **Intervention; Procedure,** 2.

VARIANCES. See **Constitutional Law,** I, 1–3; **Elections,** 1.

VENIREMEN. See **Constitutional Law,** XII, 2; **Juries.**

VERDICT OF JURY. See **Federal Rules of Criminal Procedure,** 1.

VESSELS. See **Admiralty; Longshoremen's and Harbor Workers' Compensation Act.**

VOLUME OF SALES. See **Antitrust Acts,** 3–5.

VOLUNTARINESS. See **Constitutional Law,** VI, 6; XII, 1–2; **Evidence,** 3; **Juries; Procedure,** 11; **Trials.**

VOLUNTARY PLEAS. See **Federal Rules of Criminal Procedure,** 3.

VOTERS. See **Constitutional Law,** I, 1–3; **Elections,** 1.

VOTING. See **Constitutional Law,** III, 1, 3; **Mootness; National Labor Relations Board.**

VOTING RIGHTS ACT OF 1965. See also **Constitutional Law,** III, 2; **Elections,** 2.

Disqualification of candidates in Alabama election—Garrett Act.—Disqualification of National Democratic Party of Alabama candidates for failure to comply with the State's Garrett Act was unlawful since that Act, which imposed increased barriers before independent candidates, was inoperative because Alabama officials had failed to meet the approval requirements of § 5 of the Voting Rights Act of 1965. Hadnott v. Amos, p. 358.

WAITING PERIOD. See **Constitutional Law,** III, 4; IV; X.

WARRANTIES. See **Admiralty; Longshoremen's and Harbor Workers' Compensation Act.**

WARRANTS. See **Constitutional Law,** V, 2; VI, 4–5, 8; **Evidence,** 1; **Obscenity.**

WELFARE ASSISTANCE. See **Constitutional Law,** III, 4; IV; X.

WESTERN UNION OFFICE. See **Constitutional Law,** II, 2; **Procedure,** 7.

WESTINGHOUSE ELECTRIC CORP. See **Taxes,** 2.

WIDOW. See **Admiralty; Longshoremen's and Harbor Workers' Compensation Act.**

WILFULNESS. See **Federal Rules of Criminal Procedure,** 3.

WIRETAPPING. See **Constitutional Law,** VI, 8; **Evidence,** 1.

WISCONSIN MOTOR CO. See **Certiorari; National Labor Relations Act,** 1, 3.

WITNESSES. See **Constitutional Law,** VI, 6; XII, 1; **Evidence,** 3; **Procedure,** 11; **Trials.**

WORDS. See also **Constitutional Law; Jurisdiction.**

1. *"Device."*—Federal Food, Drug, and Cosmetic Act, § 201 (h), 21 U. S. C. § 321 (h). United States v. Bacto-Unidisk, p. 784.

2. *"Drug."*—Federal Food, Drug, and Cosmetic Act, § 201 (g) (1)(B), 21 U. S. C. § 321 (g)(1)(B). United States v. Bacto-Unidisk, p. 784.

3. *"Evidence."*—National Labor Relations Act, § 11 (2), 29 U. S. C. § 161 (2). NLRB v. Wyman-Gordon Co., p. 759.

4. *"Knowingly hav[ing] possession of . . . obscene matter."*—Ga. Code Ann. § 26–6301 (Supp. 1968). Stanley v. Georgia, p. 557.

WORKING AREA. See **Admiralty; Longshoremen's and Harbor Workers' Compensation Act.**

WORK-STUDY PROGRAMS. See **Taxes,** 2.

WRONGFUL DEATH. See **Admiralty; Longshoremen's and Harbor Workers' Compensation Act.**

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